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TORRENS SYSTEM MORTGAGES

With chapters on

Notice, Fraud and Caveats

By

WALTER S. SCOTT, LL.D. (Dub.)

Of Lincoln's Inn, London, and the Bar of Alberta.

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INTRODUCTION

Though it is quite apparent that the time for a definitive work on Torrens System Mortgages has not yet arrived, it is equally apparent that there has long existed a necessity for a work which would crystallize the great number of decisions which have been given on the subject in Canada and Australia.

An attempt has been made in this book to deal with all the law peculiarly applicable to Torrens System Mortgages, and at the same time, without any sacrifice of the primary aim of the book, to give such a presentation of general mortgage law as will suffice for the needs of the practitioner under all but the most extraordinary circumstances.

In making this attempt the author has carefully gone through all Canadian cases dealing with mortgage problems, and such Australian cases as seemed likely to throw light upon their solution.

The author has availed himself, to a large extent, of the labours of his predecessors, and would here acknowledge his deep indebtedness to them.

Chief among them is Mr. J. E. Hogg, whose work on the Australian Torrens System has been found invaluable. Use has also been made of Mr. Thom's Canadian Torrens System; if the author seldom mentions the latter, except to disagree with his conclusions, that must be attributed to the

nature of the work, and not to any lack of respect and gratitude.

Other works which have been found of help, are Mr. Power's work on the "Real Property Acts" of Queensland; Mr. Canaway's work on the Real Property Act, 1900 (N.S.W.); Messrs. Duffy and Eagleson's work on the Transfer of Land Act, 1890 (Victoria), and Mr. David Hutchen's work on the Land Transfer Act, 1908 (New Zealand).

To Mr. A. U. G. Bury and Mr. Geo. Steer (Barristers) thanks are due for help readily given in the preparation of the work for the press.

In the hope that the book will to some extent fill the real want, the perception of which gave it birth, the author ventures to claim an indulgent reception for it on the part of the legal profession.

WALTER S. SCOTT.

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TORRENS SYSTEM MORTGAGES

CHAPTER I.

Nature of Mortgage.

The fact that in England the essential characteristic of a mortgage is a conveyance of or an agreement to convey land, whereas in Western Canada the same word is employed to mean the creation of a security without any conveyance of the land, renders it necessary to distinguish between the two uses of the term by as accurate a definition as is possible.

A mortgage, in England, is a conveyance of land, or an assignment of chattels, as a security for the payment of a debt, or the discharge of some other obligation for which it is given (per Lindley, L.J., in *Santley* v. *Wilde,* 68 L. J. Ch. 681, at 686; [1899] 2 Ch. 474).

The conveyance or agreement to convey is the essential thing, while if there is no covenant and no accompanying bond, there is still the implied promise to pay, and if there is a time fixed, either by recital or otherwise, for the repayment, in many cases depending upon the construction of the instrument, the Court will imply even a covenant to pay. "That being so, does not every mortgage contain within itself, so to speak, a personal liability to repay the amount advanced?" (per Jessel, M.R., *Sutton* v. *Sutton,* 52 L. J. Ch. 333, at 335; 22 C. D. 511, at 515).

To such a mortgage there were incident the right of redemption, *i.e.*, the right of the mortgagor to redeem his property upon payment of principal, interest and costs, and, for all practical purposes, the right of foreclosure, whereunder the property belongs to the mortgagee absolutely, *i.e.*, upon its occurrence the equitable estate of the mortgagor is forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or released (*Heath* v. *Pugh*, 50 L. J. Q. B. 473, at 478, per Lord Selborne). The foreclosure order vests a new title in the mortgagee. When the owner of land under an ordinary decree of foreclosure absolute, takes proceedings to recover possession of that land, he seeks possession of that which by a title newly accrued for the first time becomes his own property; and it can make no difference whether the title which he previously had was protected by the legal estate or not (*Heath* v. *Pugh, supra*).

In Manitoba a Torrens System mortgage has effect as a security but does not operate as a transfer of the land thereby charged, or of any estate or interest therein; in Alberta and Saskatchewan a mortgage has effect as security, but does not operate as a transfer of the land thereby charged.

In Manitoba the mortgagee may, upon any default in payment, enter into possession by receiving the rents and profits of the land, with a power of distraint, and may bring an action to recover the land as if the money secured by the mortgage had been secured by an assurance of the legal estate in the land (s. 114). The

power of distraint appears to be confined to a first mortgagee for the time being (s. 115). Every first mortgagee for the time being has the same rights and remedies at law and in equity as he would have had if the legal estate had been actually vested in him with a right in the owner of the land of quiet enjoyment of the mortgaged land until default in payment, or breach of a mortgage covenant, express or implied (s. 116). Upon such default continuing for a month or any longer period agreed upon in the mortgage, the mortgagee may upon notice enter into possession, and take the rents, issues and profits thereof, make any lease of the lands or any part of them, whether in or out of possession, and may by the notice require payment of the moneys due, or observance of the covenants broken, within a period specified (s. 118). Upon default continued for one month from the service of the notice the land may be sold and transferred by the mortgagee (ss. 119-121).

If default is made in payment of the principal or interest moneys secured by a mortgage and is continued for the period of six months, and the amount bid at the sale was not sufficient to pay the mortgage moneys and expenses then, after a notice of intention to apply for foreclosure has been given, an order for foreclosure may issue, unless in the interval a sufficient amount has been obtained by the sale of such land, or paid by or on behalf of such owner, mortgagor or encumbrancer or other person as aforesaid to satisfy the principal and interest and other moneys secured, and all expenses occasioned by such sale proceedings.

In Manitoba (s. 108 of the Real Property Act) it is provided that a mortgage or incumbrance under the new system shall have effect as a security, but shall not operate as a transfer of land thereby charged, or of any estate or interest therein.

In *Thompson* v. *Yockney* (3 W. W. R. 591), it was decided that the word "interest" in section 108 was merely synonymous with the word "estate," and upon appeal to the Supreme Court of Canada, the judgment of the Court of Appeal (6 W. W. R. 1397), was upheld, Duff, J., pointing out that the effect of section 108 had been fully considered in *Smith* v. *National Trust Co.* (1 W. W. R. 1122), where it was pointed out that title was consummated by registration, and that the effect of section 108, was that the holder of a mortgage or incumbrance registered under the Act has not vested in him, in whole or in part, the registered title. The execution and registration of the mortgage, in a word, does not immediately effect any dismemberment of the mortgagor's registered title. In that sense the mortgagee has no estate or interest in the land. It is important to note that Duff, J., is clear on the point, that a mortgage does create an interest in land. "I entirely agree," says he, "with the learned trial Judge (Mathers, C.J.), that it is something very much like a contradiction in terms to say that a mortgagee, having the powers of sale and foreclosure vested in him by the statute, together with other rights as to the possession of the land, which the statute gives him, has not in the broader sense of the word, an interest in the mortgaged land. I

do not think that section 130 (as to the right to lodge a caveat) can properly be limited to cases in which the claim is to be registered as possessor in whole, or in part, of the registered title. In other words, I do not think it can be properly limited to those cases, in which an interest is claimed in the restricted sense in which interest is used, in section 100."

A mortgage indeed seems to be what is described in *Joseph* v. *Mulder* (72 L. J., P. C. 50), as an inchoate and potential alienation. "The charge imposed by a mortgage," says Sir John Bonser, delivering the judgment of the Privy Council in this case, on appeal from the decision of the Supreme Court of the Cape of Good Hope, "can only be enforced by a judicial sale, and until such a sale has been effected, the property cannot be said to have been sold or disposed of to a stranger."

CHAPTER II.

METHODS OF CREATING A MORTGAGE, OTHER THAN BY A STATUTORY CHARGE.

The Acts do not forbid the effecting of a mortgage by other methods than the registration of a statutory mortgage.

Thus mortgages may be made:—

(1) By an out and out transfer, together with an arrangement for defeasance upon repayment.

(2) By an agreement to give a mortgage, or

(3) By a deposit of the certificate of title, or other document with or without a memorandum of deposit.

MORTGAGES BY TRANSFER ABSOLUTE IN FORM.

In *Blunt* v. *Marsh,* 1 Terr. Law Reports 126, it was held that a transfer absolute in form might yet be held to merely amount to a mortgage. (See also *Wallace* v. *Smart,* 19 W. L. R. 787; *Arnold & National Trust Co.,* 3 W. W. R. 183; *Rutherford* v. *Mitchell,* 15 Man. L. R. 390; *Reeves* v. *Konschur,* 10 W. L. R. 680; *Smith* v. *National Trust Co.,* 45 S. C. R. 670, and *Sander* v. *Twigg,* 13 V. L. R. 765).

In *Wallace* v. *Smart, supra,* it was held that a power of sale will not be implied where the mortgage is by a deed absolute in form. (*See Pearson* v. *Benson,* 28 B. 598, *Oland* v. *McNeil,* 32 S. C. R. 23, distinguished).

The general principles as to this are that an instrument which is in form an absolute convey-

ance will be treated as a mortgage, notwithstanding the absence of any proviso for redemption, if such absence is due to fraud, mistake or some unfair advantage taken by the mortgagee, and parol evidence is admissible, to say that a proviso for redemption was omitted. (*Lincoln* v. *Wright,* 4 DeG. & J. 16, and *Walker & Walker,* 2 Atk. 98).

Difficult cases often arise as to whether the case is one of lending and borrowing or one of out and out sale, with a condition for repurchase and reconveyance.

The tests usually are:—

(1) Who paid the costs of the transaction? The practice is that the mortgagor pays them when the transaction is a mortgage.

(2) Did the transferee take possession immediately?

(3) Did the transferee upon taking possession, if he did so, keep account of rents and profits, that being the proper course for a mortgagee in possession to take?

(4) Was the consideration for the transfer adequate?

Where an absolute transfer was made with a deed of defeasance, it was held that both documents should be looked at to see the true nature of the transaction, which only amounted to a mortgage; therefore the transfer was not liable as such to payment of duty under the Stamps Acts. (*In re Muller, Ex parte Ballarat L. M. & A. Co. Ltd.,* 17 A. L. T. 43; 1 A. L. R. 58, at 84).

There has been, and still is, in Queensland a practice of taking as security for money lent a

transfer in lieu of a bill of mortgage in the form prescribed by section 56, of the Queensland Act, the object being to improve the position of the mortgagee, and particularly to avoid the necessity of complying with the requirements of the Act with respect to the exercise of the power of sale under the mortgage. The Registrar of Titles is, however, of opinion that such a security is contrary to the intention of the Act, and, relying, it is said, upon the *dicta* of Griffith, C.J., in the case of *Cox* v. *Bourne* (B. C. R. 1st April, 1897), he refuses to register any transfer which has to his knowledge been given by way of security. (Power, p. 66).

"It may now be convenient to say something about the custom of taking transfers instead of mortgages. We are told that it is a common practice among money lenders when they lend money, instead of taking a mortgage, to take a transfer. Now, the effect of such a transfer, when registered at the Real Property Office, is the same as if the owner has sold all his interest in the land, and the person who gives the transfer can only get it back by establishing a case of fraud. Well, the full Court, a month or two ago (*R.* v. *Bourne, Ex parte Dare,* B.C.R., 17th Feb., 1897), expressed the opinion that transactions of that kind are *prima facie* fraudulent, and they refused to order the Registrar to register a transfer of that kind on the ground that they would be ordering him to give effect to what was *prima facie* a fraud." (Per Griffith, C.J., in *Cox* v. *Bourne,* B. C. R., 1st April, 1897). See also *Honeybone* v. *National Bank of New Zealand* (9 N. Z. L. R. 102).

As to the nature of a right to a re-transfer of land where land has been transferred by way of mortgage, see *Sander* v. *Twigg,* 13 V. L. R. 765; *Watson* v. *Royal Permanent Benefit Soc.,* 14 V. L. R. 283; *Richmond Local Board* v. *Victorian Permanent Benefit Soc.,* 16 V. L. R. 845, and *Attorney-General* v. *Walters,* 17 N. S. W. Eq. 105.

Mortgage by Agreement to Execute a Formal Mortgage.

In *Gilbert* v. *Ullerich,* 17 W. L. R. 157, it was held by the Supreme Court of Saskatchewan, en banc, that an agreement to deliver upon demand a mortgage on specified lands operated as an equitable mortgage, but that the document being unregisterable and merely filed by way of caveat was, as far as the land itself was concerned, inoperative to put the persons claiming under it in any better position than any other simple contract creditor of the mortgagor, and that before they could have a lien against the land itself they must prosecute their claim to judgment, and either obtain an order of the Court making their claim a lien upon the land, or obtain judgment and execution for the amount due them and file the execution in the Land Titles Office.

In *Sawyer & Massey Co.* v. *Waddell* (6 Terr. L. R. 45), Newlands, J., upon an application similar to that suggested in *Gilbert* v. *Ullerich* (*supra*), held that an agreement that vendors of machinery should have a charge and specific lien for the purchase money, supplemented by a charge on specific lands, amounted to an equitable mortgage, approv-

ing of the statement in Robbins on Mortgages, that any agreement in writing and properly signed, however informal, by which any property, real or personal, is to be a security for a sum of money owing or advanced, is a charge and amounts to an equitable mortgage.

Where an agreement contains nothing more than an agreement to mortgage land for a stated consideration, and the land is under the Land Transfer Act, 1908, and the Land Act, 1908, the covenants, conditions and powers implied under section 103 of the Land Act, 1908, apply, and the agreement is to be read as an undertaking to execute a mortgage containing the provisions implied by those statutes, and is not too uncertain to be enforced (*Smith* v. *Patterson,* 13 N. Z. Gaz. L. R. 99).

Mortgage by Deposit of Certificate of Title or Other Document.

In *Fialkowski* v. *Fialkowski* (1 W. W. R. 216), it was held that the deposit of a certificate of title as security for a loan constituted an equitable mortgage.

In *Acme Company* v. *Huxley* (18 W. L. R. 534), it was held by Beck, J., that a deposit by a husband of a transfer from his wife to himself, given to him with the mere authority to pledge it as security for an instalment of a debt to a mortgagee, though unaccompanied by the defendant's certificate of title, constituted an equitable mortgage for the full amount for which it was pledged by the husband.

Beck, J., approved of the statement in 27 Cyc. p. 988, that to constitute a good equitable mortgage, it is not necessary that the deeds deposited should show a complete title in the depositor, provided that they are material to the title, so that he could not establish a title without producing them, nor is it necessary that all the title deeds, or even all the material title deeds should be deposited. It is sufficient if the deeds deposited are material evidence of title, and are shown to have been deposited with the intention of creating a mortgage.

This decision was upheld upon appeal to the Appellate Division upon an equal division, Stuart and Simmons, JJ., holding, among other things, that no title deeds of the defendant, the wife, had ever been deposited.

In *Tolley* v. *Byrne* (28 V. L. R. 95), an equitable mortgage by deposit was held to create an interest in land so far as, even when unprotected by caveat, to entitle the holder to compensation from the assurance fund.

Hogg, p. 787, says that the better opinion is, as expressed in *Plumpton* v. *Plumpton,* 1885, 11 V. L. R. 733, that a certificate of title is not on the same footing as ordinary title deeds, and that the decision in *Plumpton* v. *Plumpton,* where the depositor was not the registered proprietor, seems to imply that the land itself would not be bound by a mere deposit of the certificate of title any more than by a contract of sale. The security would become effective, as a sale and purchase transaction would also become, through the

medium of the doctrine of notice only, whether by means of entry of a caveat, or otherwise.

In *Tolley* v. *Byrne, supra,* àBeckett, J., said, "I cannot conceive of any sound ground for saying that it is not an interest in land. It amounts to a contract between the parties, the security to be given over that land for the debt for which it was deposited. The right is specifically attached to that land just as under the contract for a sale of land an equitable interest is created in the land."

The validity as equitable rights of securities created by deposit is now, apart from express enactment in some of the statutes, firmly established by judicial decision. (Hogg, 786; *London Charter Bank* v. *Hayes,* 2 V. R. (Eq.) 104; *Patchell* v. *Maunsell,* 7 V. L. R. 6; *Colonial Bank* v. *Ridell,* 19 V. L. R. 280; *Re Nathan,* 1 S. A. L. R. 166; *Re Wildash,* 1 Q. L. R. Part II. 47; *Wheaton* v. *McGeorge,* 10 S. A. L. R. 29; *Richards* v. *Jones,* 1 S. A. L. R. 167).

In *In re Elliott,* 7 N. S. W. R. 271, it was held the deposit of title deeds of land as a pledge for a debt confers by the law of the Dominion no interest in the land, and the depositee has therefore no caveating capacity by virtue of such deposit. (*Beckett* v. *The District Land Registrar,* 28 N. Z. L. R. 788, following *Staples* v. *Corby,* 19 N. Z. L. R. 517).

It would seem to be doubtful whether an equitable mortgagee by deposit of title deeds was entitled to a sale under the Common Law Procedure Act, 1852, unless the deposit was accompanied by a written agreement by the depositor to execute

a formal mortgage (*Oldham* v. *Stringer,* 51 L. T. 895; 33 W. R. 251), though he is entitled to foreclosure. (*James* v. *James,* 16 Eq. 153; 21 W. R. 522).

See for form of order in case of mortgagee by deposit of certificate of title, *infra.*

A registered owner of land executed a transfer in favour of A. for a nominal consideration. A. did not register the transfer but deposited it, together with the certificate of title, with a bank as security for an overdraft. It was held that the bank only acquired the right of A. against the registered owner, and was not entitled to hold the land as security against the latter. (*Plumpton* v. *Plumpton,* 11 V. L. R. 733).

It is said to be a common practice in Queensland for the mortgagee to obtain judgment in an action on the covenant to pay, issue a *fi. fa.* and buy in the land at the sale. There is no rule which prevents a plaintiff mortgagee who has obtained judgment on the covenant in the mortgage from bidding for the mortgaged property at a sheriff's sale under the judgment. (*Union Bank* v. *Atkins,* 10 Q. L. J. N. C. 11. See also *British and Australasian Trust Co.* v. *Johnston,* 3 Q. L. J. 162. Power, p. 83).

FORM OF ORDER NISI (MORTGAGE BY DEPOSIT)—28 V. L. R., P. 252.

"This Court doth order and declare that an account be taken of what is due to the plaintiffs for principal money advanced on the security of the deposit by the defendants with the plaintiffs'

testator of a certificate of title under the Transfer of Land Act entered in the register book, volume , folio , and the charge created by an agreement dated the 24th day of March, 1890, and made between the defendant and the plaintiffs' testator over the lands comprised in the said certificate of title, and also for interest thereon and for their costs of this action, to be taxed and ascertained by the taxing officer of this Court. And that upon the defendant paying to the plaintiffs what shall be certified to be due to them for principal, interest and costs as aforesaid, within six calendar months after the date of the Chief Clerk's certificate, at such time and place as shall be thereby appointed, the plaintiffs do deliver up the said certificate of title. But that in default of the defendant paying to the plaintiffs what shall be so certified to be due to them for such principal, interest and costs, as aforesaid, by the time aforesaid, it is hereby ordered and declared that the plaintiffs will be entitled to the said lands free and clear of and from all right, title, interest and equity of redemption of, in and to the same, and to have an absolute transfer thereof accordingly. And in that case that the defendant execute such transfer thereof to the plaintiffs, such transfer to be settled by the Chief Clerk in case the parties differ. And any party is to be at liberty to apply therein to this Court as there may be occasion."

For form of order where a mortgagee by deposit subsequently took transfer by way of security and there were executions subsequent to the transfer, see *Quebec Bank* v. *Royal Bank,* 10 W. W. R. 218.

CHAPTER III.

Effect of Mortgage Before Registration.

As to the effect of a mortgage before registration, it was said in *Wilkie* v. *Jellett,* 2 Terr. L. R. 133; 26 S. C. R. 282, that a transfer not under seal would not, apart from the Territories Real Property Act, pass any title, and it being the creature of the statute, could only become effectual formally to pass the estate when it was duly registered, a view which was adopted by Stuart, J., in *Acme Co.* v. *Huxley,* 20 W. L. R. 133. But apart altogether from their being prescribed by statute, and apart from their being registered, statutory instruments may be just as valid as any other written instrument constituting or embodying an agreement between two contracting parties. Thus a statement or representation in an unregistered instrument may amount to a covenant by the person making it, that he has a good title under the system, for breach of which he may have to answer in damages (*Little* v. *Dardier,* 12 N. S. W., Eq. 323), or such a representation may amount to an estoppel (*Bucknall* v. *Reid,* 10 S. A. L. R. 188; *Wellington Ry.* v. *Registrar-General,* 18 N. Z. L. R. 250; *Staples* v. *Corby,* 19 N. Z. L. R. 517. Hogg, p. 904).

It seems probable also that instruments before registration confer a right to be registered, and confer equitable interests through the operation of the doctrine of specific performance. (See *National Bank* v. *United Hand-in-Hand Co.,* 4

A. C., at 407; *Mathieson* v. *Mercantile, Finance and Agency Co. Ltd.,* 17 V. L. R. 271, and see as to the nature of an estate or interest conferred by a right to specific performance *Miller* v. *Howard,* 7 W. W. R. 627; 84 L. J. P. C. 49), and in any event operate as a contract between the parties, so as to define their rights and liabilities *inter se,* as from their dates (*Mathieson* v. *Mercantile Finance Co., supra,* and *Munro* v. *Adams,* 17 V. L. R. 703).

As to the recognition of equitable interests in general see *Williams* v. *Papworth,* 69 L. J. P. C. 129, and *McEllister* v. *Biggs,* 8 A. C. 314.

It is said that no actual estate passes by the execution of a statutory instrument, and that such execution only gives a right *in personam* (see *Otago Board* v. *Spedding,* 4 N. Z. S. C. R. 272, and *Waitara* v. *McGovern,* 18 N. Z. L. R. 372). In this connection it seems to be sometimes forgotten that under English law a contract for the sale of land, though only giving a right *in personam,* yet would be more aptly described as giving a right *in personas, i.e.,* against a group of persons, which may possibly be very large, *i.e.,* all the persons claiming through or under the person executing the statutory instrument as volunteers, and without registration (heirs, devisees, personal representatives, donees), his creditors, and, under certain circumstances, persons acquiring his interest with notice of the unregistered instrument.

A transferee, by a voidable transfer from a registered owner, produced to an intending mortgagee the transfer and an order on the Registrar-

General to deliver the certificate of title and induced him to advance money.

Held, that the mortgagee was entitled as against the registered owner to a charge on the land in terms of the mortgage (*Barry* v. *Heider,* 1914, 19 C. L. R., p. 197).

In that case it was said that an unregistered transfer confers upon the transferee an equitable claim or right to the land comprised therein, and such claim or right is in its nature assignable by any means appropriate to the assignment of such interest. The transfer operates as a representation addressed to any person into whose hands it may lawfully come without notice of any right in the transferor to set it aside, that the transferee has such an assignable interest.

The contention that until registration no person can acquire any interest in land legal or equitable, and that whatever personal liability exists can only be enforced as a chose in action against the person liable, but not against the land, is absolutely opposed to all notions in Australia with regard to the Land Transfer Act. (Isaacs, J.).

The execution by a lessee of lands under the Land Transfer Act, 1885, of an instrument purporting to be a mortgage under the Act of his interest in the lands leased, is not a breach of a covenant not to mortgage, so long as the instrument is not registered (*Tattley* v. *Cooper,* 7 N. Z. Gaz. L. R. 625; see also *Naumburg* v. *Albertson,* 3 Q. L. J. 125).

The covenants implied by a mortgage apparently do not arise until the mortgage has been

registered, but express covenants apparently for payment may be sued upon even before the mortgage is registered (*Mathieson* v. *Mercantile Finance Co.*, 1891, 17 V. L. R. 271; *Mercantile Building Co.* v. *Murphy*, 1888, 4 W. N. N. S. W. 105).

In *Arnot* v. *Peterson*, 2 W. W. R. 1, Beck, J., held that a Torrens transfer may be executed in blank, and authority express or implied given to the person to whom it is handed or anyone else to fill in the name of the transferee. A transfer, he says, made under the Land Titles Act, is not a deed of grant; it does not pass the title, and its practical effect is nothing more, or at all events little more, than a mere order to the Registrar, by the holder of the registered title, to transfer the title to somebody else. "Now there is no reason in law why an instrument of that sort should not be executed in blank with authority given to the person to whom it is handed, or to anybody else, to fill in, under certain instructions, the name of the so-called transferee, who, in reality, is the person to whom the Registrar is to be requested to issue a new certificate of title. I do not think that the law which has been referred to with regard to alterations in deeds of grant and other documents under seal, by which title passes, has any application to an instrument of that kind."

In Australia there are *dicta* on this point both ways, but no actual decision (see *Trembath* v. *Carr*, 23 V. L. R. 437, where the validity of a mortgage signed in blank seems to have been taken for granted).

In *Gilbert* v. *Bourne*, 6 Q. L. J., at p. 272, it was said by Harding, J.: " It is not necessary for the

decision in this case, but after careful consideration of the Real Property Act, I think that there is a formidable, if not an irresistible argument, that a blank transfer is no better than a blank sheet. The Act is very specific and clear as to what constitutes any memorandum of transfer in the same way as in a deed. To constitute a deed there has to be a sealing. To constitute a memorandum of transfer, certain details must exist before it becomes a transfer. I have a strong opinion that such a document is absolutely void."

It has been held in *Finucane* v. *The Registrar of Titles,* 1902, S. R. Q. 75, that a deed, if unregistered, has no more effect than if it had been made not under seal, and it is suggested by Hogg (p. 909) that it is reasonable to suppose that in the case of an express stipulation—and not one implied by the statutes—contained in a statutory instrument, nothing short of due registration would be held to give it the technical effect of a deed in general law. (See *Kelly* v. *Fuller,* 1 S. A. R. 14, and *Sinclair* v. *Gumpertz,* 15 W. N. (N.S.W.) 125).

It has been held in *Timaru* v. *Hoare,* 16 N. Z. R. 582, that a person named in an unregistered instrument as transferee of an estate or interest is not bound by the provisions of the instrument if he does not execute it, and he seems to be no further bound by the registration of the instrument. (See *Wellington & Manawatu* v. *Hazelden,* 18 N. Z. R. 278).

A statutory instrument such as a mortgage may be executed by a person who has not yet been reg-

istered, with the intention of registering his transfer and the mortgage simultaneously (*Royal Bank of Canada* v. *Banque d'Hochelaga,* 7 W. W. R. 817).

It should be noticed that in the Canadian statutes, there is no provision, as there is in Australian statutes, giving agreements in statutory forms the same force as if made by deed. See as to suggested differences in the law in the two countries arising from this fact: *Great West Lumber Co.* v. *Murrin & Gray,* [1917] 1 W. W. R. 945.

The covenants which are implied in a mortgage are as follows:—

In Alberta there is implied against the mortgagor remaining in possession a covenant that he will repair and keep in repair all buildings or other improvements erected and made upon the land, and that the mortgagee may at all convenient times, until the mortgage is redeemed, be at liberty with or without surveyors or others to enter into or upon the land to view and inspect the state of repair of the buildings or improvements. (Land Titles Act, section 69).

A similar provision occurs in the Saskatchewan Land Titles Act, section 102, but no such provision appears in the Manitoba Act.

For the covenants implied in a transfer of mortgaged land, see Chapter V., *infra.*

CHAPTER IV.

Form of Mortgage.

A statutory instrument is defined by Hogg as an instrument which is either in the form prescribed by the statutes, or officially authorized for general use, or, which although not in such form, is accepted by the registry as sufficient under the circumstances, as if it were in prescribed form. In general, he says, "A scheduled form is not intended to be rigidly adhered to, but to be adapted to circumstances as they arise," citing *Ex parte Hamilton* (3 S. C. R. (N.S.W.) 317).

A statutory mortgage requires attestation, and, at any rate as between the parties to the instrument, it seems that invalidity for want of attestation would not be cured by registration. (See *Nichols* v. *Skedanuk,* 4 W. W. R. 587.) Hogg, at p. 917, notes as the real distinction between an ordinary deed of assurance and a statutory instrument duly signed, etc., and the vital difference in the functions assigned to the registration of the deed under the general law, and registration under the Torrens system, the difficulty of exactly defining the position of a transferee under a statutory instrument in case the transferor should happen to die after signing the transfer, and before its registration.

He concludes that as between volunteers at any rate it cannot be said that the transferee, etc., is absolutely entitled to have his statutory instrument registered, if his transferor had died since signing it.

In *Re Kelly & Colonial Investment Loan Co.*, 3 W. L. R. p. 62, it was held that a covenant in a mortgage to a loan or investment company to observe the rules and by-laws of such company had not the effect of incorporating them in the mortgage, and would not bind the transferee of the mortgagor. The decision was given in reliance upon *Wilkins* v. *Deans,* 1888, 6 N. Z. L. R. 425, where it was held that the rules of a building society which were referred to in the mortgage were not thereby incorporated in it.

As to the form of the instrument, it has been held in Australia that the object of the Transfer of Land Act is not to obstruct, but to facilitate business, and that the Registrar is not justified in refusing to register an instrument merely because it does not literally comply with the precise form prescribed for such instruments, provided that any variation from the form does not affect the substance (*Drake* v. *Templeton,* 1913, V. L. R. 537; *Perpetual Executors and Trustees Assn. of Australia Ltd.* v. *Hoskin,* 14 C. L. R. 286, and *Mahoney* v. *Hoskin,* 14 C. L. R. 379).

The Registrar of Titles ought not to refuse to register an instrument of mortgage because it contains a guarantee signed by persons other than the parties to the mortgage, guaranteeing the due performance by the mortgagor of the covenants of the mortgage (*Re Hoskin,* [1911] V. L. R. 357; in which case *In re the Transfer of Land Act, Ex parte Clarke,* 17 V. L. R. 82, was followed, and *Taylor* v. *The Land Mortgage Bank of Victoria,* 12 V. L. R. 748, was explained).

As to compliance with the statutory form, the general principle is to be found in those English cases which deal with the form of Bills of Sale; thus in *Thomas* v. *Kelly,* 58 L. J. Q. B. 66, Lord Fitzgerald says: "Does the bill of sale before your Lordships conform to the provisions of the Statute? Is it in accordance with the form? I do not think that the legislature intended by the words 'in accordance' a literal conformity with the statutory form of the bill of sale. I adopt the view of Lord Justice Bowen that it is sufficient if the bill of sale is substantially in accordance with and does not depart from the prescribed form in any material respect. In *Ex parte Stanford,* 55 L. J. Q. B. 341; L. R. 17 Q. B. D. 259, Lord Justice Bowen, in laying down a rule of construction, as the judgment of the whole six Judges of the Court of Appeal, says a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect either greater or smaller than that which would attach to it, if drawn in the form which has been sanctioned, and he adds: 'We must consider whether the instrument as drawn will, in virtue either of addition or omission, have any legal effect which either goes beyond or falls short of that which would result from the statutory form.' That he states to be the rule of construction. I would hesitate to criticise a proposition coming from a tribunal so important and so weightily constituted. I am not now called on to do so, nor shall I say more than that I am not now to be taken as adopting in all its terms that rule of construction as affording an inclusive as well as exclusive test."

It has been held that if by reason of a variation in form the bill of sale is misleading (*Ex parte Stanford, supra*), or if its wording produces what is conveniently termed a puzzle, as for instance, by the use of inconsistent clauses, it is not in accordance with the statutory form (see *Furber* v. *Cobb*, 18 Q. B. D. 494, and *Curtis* v. *National Bank of Wales*, 5 T. L. R. 338.

In *Thomas* v. *Kelly, supra,* Lord McNaughten said: "It has been held, and I think rightly, that section 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the Act are 'in accordance with the form,' not 'in the form;' but then comes the question when is an instrument which purports to be a bill of sale not in accordance with statutory form? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly, I should say when it departs from the statutory form in anything which is characteristic of that form."

In *North West Telephone Co.*, 12 W. L. R. 300, a mortgage containing a reference to a trust deed conveying unspecified lands unto and to the use of a trustee was held to be unregisterable.

In *Re Spokane* v. *Eastern Trust Co.'s Mortgage,* 15 W. L. R. 637, it was held that an instrument purporting to be a mortgage, but containing a clause by which the mortgagor purported to convey his estate in the land to the mortgagee, and also an *habendum* clause, was unregisterable.

In *Re Rumley Co.*, 17 W. L. R. 160, it was held that a document which showed on its face that its

object was to secure a debt was a mortgage, and could be registered only when it complied with Form I., appended to the Saskatchewan Land Titles Act (the form appropriate to a mortgage), and also that even if the instrument had not shown on its face that its object was to secure a debt, it still could not be registered owing to non-compliance with Form J. (the form proper to an incumbrance). The case further laid down the general principle that the class of documents which can be registered are limited to those specified in the Act, and that a man cannot obtain registration of a non-registerable agreement by tacking it on to one which is in the registerable form, if the effect is to vary the legal consequence of the latter.

In *Nichols* v. *Skedanuk,* 4 W. W. R. 587, it was held that in view of sections 60 and 102 of the Land Titles Act, Alberta, attestation is necessary before a document can be treated as a valid mortgage under the Act, and that the particular circumstances of the case rendered it doubtful whether the proviso to section 103 of the same Act, empowering a Judge to authorize the registration of the instrument notwithstanding its defective execution, was applicable.

It has been decided by the Master of Titles in Saskatchewan that a mortgage with a trust deed attached and incorporated therein, such trust deed containing a power of attorney from the mortgagor to the mortgagee, is registerable under the Land Titles Act, relying upon the words of Lamont, J., in *Re Rumley Co., supra,* which expressed as a proper test the words of the Inter-

pretation Act, section 5, sub-section 36, which provides that whenever forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead shall not vitiate them.

In *Re Rumley Co.,* Lamont, J., stated the object of the legislature in providing the form in the Land Titles Act to be two-fold, first, to enable those using them to know without difficulty the nature and effect of the instruments they are executing; secondly, to enable Registrars also without difficulty to determine whether or not documents presented to them for registration are in the proper form. An exact verbal compliance is not necessary, but the document must be in substance the same as the form prescribed, and it is not the same in substance when the divergence in form gives to one or more of the parties to it rights or remedies, or imposes upon them duties or obligations, which would not result from the use of the prescribed form.

The mere fact that the Acts prescribe a form of mortgage for registration, and that an unregistered instrument which creates an equitable mortgage is not in that form should not constitute a bar to the protection of such mortgage interest. Such equitable mortgage may be protected by caveat notwithstanding the decisions in *Re Ebbing,* 2 Sask. L. R. 167, and *Gaar-Scott* v. *Giguere,* 2 Sask L. R. 674, as what was laid down in those cases ought not to be extended any further than their special circumstances warranted. (See also *Re Wark Caveat,* 2 Sask. L. R. 431).

These cases simply hold under the particular circumstances that in order to register a mortgage or a caveat founded on a mortgage, there must be evidence to satisfy the Registrar that the mortgagor is entitled to create a mortgage, and that, until there is evidence that the mortgagor is entitled to create a mortgage, the Registrar can refuse to register the mortgage or the caveat founded upon the mortgage.

The case of *Shore* v. *Webber,* 24 W. L. R. 343, was explained by Elwood, J., as merely holding that an incumbrance which on the face of it shows that it was given for a debt due by the defendant to the plaintiff is in effect a mortgage, and not being in the form provided by the Act for mortgages can not be registered. "At the conclusion of the judgment of the last case," says the learned Judge, "a reference is made to *Gaar-Scott* v. *Giguere, supra,* and if the judgment in *Shore* v. *Webber* is intended to express the opinion that *Gaar-Scott* v. *Giguere* is authority for the proposition that a mortgage which is not in the form prescribed by the Act cannot in any case be registered by way of caveat, I must dissent from any such proposition (*Imperial Elevator Co.* v. *Olive,* 6 W. W. R. 1562).

CHAPTER V.

TRANSFER OF LAND SUBJECT TO A MORTGAGE.

It is provided in the Alberta Land Titles Act that in every instrument transferring land, for which a certificate of title has been granted subject to mortgage or incumbrance, there shall be implied the following covenant by the transferee *both* with the transferor *and the mortgagee,* that is to say, the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or incumbrance after the rate, and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument, and from and against the liability in respect of any of the covenants therein contained, or under this Act implied on the part of the transferor (Alta. s. 52).

In Saskatchewan and Manitoba, there are similar provisions, but in Saskatchewan the implied covenant is merely with the transferor, and so long as such transferee shall remain the registered owner with the mortgagee or encumbrancer (s. 63). In Manitoba the covenant is merely with the transferor (s. 97).

Stuart, J., in *Short* v. *Graham,* 7 W. L. R. 787, reviews the law as to the right of a mortgagor to indemnity upon a transfer of the mortgaged land.

Where property was sold subject to mortgage the purchaser was held in equity bound to indemnify the vendor against his personal liability to

the mortgagee under the covenant to pay contained in the mortgage. The only way by which the mortgagee could avail himself of this equitable obligation was by obtaining an assignment of his rights by the vendor to himself, and then having obtained this, he could sue the purchaser for personal judgment: *Maloney* v. *Campbell* (28 S. C. R. 228), also in the Court below (24 A. R. 224). In the latter report MacLennan, J.A., referring to a previous judgment of Chancellor Spragge, V.C., said " that very learned Judge declared emphatically that he had no doubt that the equity of a mortgagor to compel his assignee to pay would pass by express assignment to the mortgagee. He added that such an assignment would not fall within the mischief of *Prosser* v. *Edmonds,* 1 Y. & C. 481, and that class of cases, and that it would simplify the remedy for the recovery of the mortgage money, giving a direct right of suit between the party to receive and the proper party to pay, and would create the privity which alone was wanting to make such a suit maintainable.

In the result Stuart, J., held that the application of the statute should be restricted entirely to the case where there has been a real purchase by the transferee, and a complete parting with all his interest on the part of the transferor, and that whenever it is impossible for the vendor, the transferor, to take advantage of the covenant declared to be implied in his favour, that is, wherever he would have had before the statute no right against the purchaser capable of assignment to the mortgagee, then the covenant could not be implied in favour of the mortgagee either.

"I am speaking now," he says, "of course without regard to the possible exception in the case of an express agreement by the vendor to waive his right of indemnity. The law formerly was that the purchaser taking finally the whole interest in property subject to an incumbrance was bound to pay off that incumbrance, and could be sued by the vendor, and made to pay the money, not to the vendor himself, but to the mortgagee, and I think that the statute was merely intended to make that obligation enforceable by the mortgagee directly against the purchaser without any circuity of procedure."

Stuart, J., also said that he doubted very much whether the transfer in question in the case could be considered as an instrument transferring land within the meaning of the statute at all, because as a matter of fact, it did not transfer any interest in the land whatever, but only the bare legal estate. The transfer was made by way of mortgage, but no money was in fact advanced thereunder.

It should be noted that the ordinary rule of the general law that the purchaser of an equity of redemption, is in general bound in equity to indemnify the mortgagor against liability for payment of the mortgage debt, laid down in *Waring* v. *Ward,* 7 Ves., at p. 337, by Lord Eldon, C., was in a late case held not to apply where the circumstances of the transfer rebut the presumption that such was the intention of the party. (*Mills* v. *United Counties Bank,* [1912] 1 Ch. 231).

It appears that the implied covenants may be negatived, even in a vesting order (see *Bernard* v.

Faulkner, 7 W. W. R. 162), where Walsh, J., held that section 52 of the Alberta Act applied to the vesting order, and that under it the plaintiff as transferee of the land was impliedly bound to indemnify the defendant from liability under the covenant of his mortgage, yet as it was perfectly competent under section 131 of the Act, for an ordinary transferee who takes title to mortgaged lands to relieve himself from personal liability for the mortgage debt by apt words in the transfer, so the plaintiff might be freed from such implied liability by the express language of his vesting order.

In *Evans* v. *Ashcroft,* 8 W. W. R. 899, McCarthy, J., held that a trustee transferee of land subject to a mortgage cannot be held to covenant impliedly with the mortgagee that he will pay the principal money and interest secured by the mortgage. This appears to be a considerable extension of the doctrine enunciated in *Short* v. *Graham,* and subversive of the ordinary doctrine of English law that a trustee undertakes the complete liabilities of beneficial owner, looking merely to his *cestui que trust* for indemnity.

In *Montreal Trust Co.* v. *Boggs & Beresford,* 8 W. W. R. 1200, it was held that the section 63 of the Land Titles Act, Saskatchewan, had no application where the transferee of mortgaged land acquires only a portion of the mortgagor's interest in the mortgaged premises. (See *Dominion* v. *Carstens,* [1917] 3 W. W. R. 153, and *Dominion* v. *Gelhorn,* [1917] 3 W. W. R. 231).

In *Great West Lumber Co.* v. *Murrin & Gray,* 9 W. W. R. 1451, the question of these implied

covenants came before the Appellate Division of Alberta, where there was a remarkable difference of opinion as to their effect on the part of the Judges. Scott, J., doubted whether the implied covenants on the part of the transferee of mortgaged land could be negatived so as, without his consent, to deprive a person who was not a party to the instrument, of the rights given to him by the implied covenant, and that, even if such a negation was possible, it could only become effective by the express declaration in the instrument of transfer provided by section 131 of the Land Titles Act; while Stuart, J., held that a mortgagee gains nothing at all by sections 52 and 131 of the Land Titles Act, unless he has the signature of the transferee, and that either under seal or with a consideration moving from himself sufficient to give the agreement a binding force and effect, and even then that the agreement would operate in the same way, but to no greater extent than if it had been set forth at length in the transfer; whilst, Beck, J., held that section 52 was largely declaratory of the previous law, and simply meant that the transferee of mortgaged land impliedly covenanted to indemnify the mortgagor, but that the existence of such a covenant may be rebutted, and that the provision contained in section 131, that an implied covenant might be negatived or modified by express declaration in the instrument did not exclude the admission of other evidence to rebut the implication or to show that it does not arise.

Beck, J., expressed an opinion that the whole of section 52 ought to be repealed at the first opportunity.

Morice v. *Kernighan* (9 W. L. R. 307) is a case where a transfer of land subject to a mortgage was made with an option of repurchase upon payment of the purchase price with interest, and the transferor assigned to her mortgagee all her rights to indemnity against all and every person whatsoever under any implied covenant in any transfer given by her to the transferees. Cameron, J., held that the transfer to the defendants was absolute in fact as in form, and that the covenant to indemnify set forth in section 97 of the Real Property Act, Manitoba, must therefore be read into the transfer, and that such covenant had been effectively assigned, distinguishing *Short* v. *Graham, supra.*

In *Colonial Investment & Loan* v. *Foisie* (19 W. L. R. 748; 1 W. W. R. 397), it was held that when a mortgagee seeks to hold a transferee of mortgaged land personally liable under the implied covenant to pay, the mortgagee's claim must be expressly alleged, and such relief specifically claimed on the pleadings.

This case was followed in *Home Investment Assn.* v. *Middleditch,* 7 W. W. R. 1202, and in *Assiniboia Land Co.* v. *Acres,* 10 W. W. R. 358, where, however, it was held that the defendant had been distinctly informed of the nature of the claim against him, the statement of claim having asked for judgment "in accordance with the implied covenant referred to in the Land Titles Act," and stated that the defendant was the registered owner of the land in question.

[See Chapter XVI. and note at end of book.]

CHAPTER VI.

Parties to a Mortgage.

An infant cannot in general bind himself by a mortgage, but probably a mortgage given by an infant for securing money lent for the purpose of purchasing necessaries is not void, but merely voidable (*Martin* v. *Gale,* 4 C. D. 428; *Zouch* v. *Parsons,* 3 Burr. 1794, and *Inman* v. *Inman,* 15 Eq. 260).

Apparently, the mortgage of a person of unsound mind not so found by inquisition is binding unless it can be proved that the other party or parties to the mortgage knew the mortgagor to be so insane as to be incapable of understanding what he was doing. The general rule is that where a person apparently of sound mind, and not known to be otherwise, enters into a contract, which is fair and *bona fide,* and the parties cannot be put in *statu quo,* the obligation will be enforced against the lunatic (*Campbell* v. *Hooper,* 1 Jur. N. S. 670, and *Kirkwall* v. *Flight,* 3 W. R. 529).

A partner unless special authority is given to him so to do cannot execute a mortgage of partnership property so as to bind other partners either during the continuance of the partnership or after its dissolution (*Harrison* v. *Jackson,* 7 T. R. 207, and *Steiglitz* v. *Eggington Holt,* N. P. 141), but any partner has an implied authority to pledge, otherwise than by deed, the real estate, if dealing in it is one of the objects of the partnership, unless he has been forbidden so to act, and

the person dealing with him either knows that he has no authority or does not know or believe him to be a partner. (*Re Ogden,* 1 Mont. & A. 494).

A personal representative of a deceased person has power to mortgage his lands.

A trustee cannot mortgage the trust property unless power is expressly given to him by the trust instrument, or where he has statutory power.

A power to mortgage is implied from a power of sale, where the latter power is given for the purpose of raising a particular charge (*Stroughill* v. *Anstey,* 1 DeG. M. & G. 635).

CHAPTER. VII.

Procedure in Registry.

Where mortgages are presented to the Registrar without being accompanied by the duplicate certificate of title, and the certificate of title is subsequently produced to the Registrar by or on behalf of another person than the intending mortgagees, and for a purpose other than the registration of those mortgages, the duplicate certificate of title cannot be considered to be in the possession of the Registrar for the purpose of registration of the mortgages. (*Re Greenshields,* 2 W. L. R. 421).

Where mortgages were received by the Registrar by mail, the Registrar was held to be not only prohibited from entering either of the mortgages in the day book, but even from *receiving* them, for the purpose of registration, inasmuch as if they had been brought into his office by some person instead of having been forwarded by mail, he might have declined to receive them at all, unless the duplicate certificate of title were produced to him. (*Re American Abell Engine & Thresher Co., and Noble,* 3 W. L. R. 324).

These decisions which were on the Dominion Land Titles Act of 1894, were followed since the introduction of the Land Titles Act in Saskatchewan, in *Re Toth* v. *J. I. Case Threshing Machine Co.,* 14 W. L. R. 704, where it was held that section 36, which provides for a receiving book, did not affect the question.

"That section," says Brown, J., delivering the judgment of the full Court, "simply contemplates the receipt of instruments, and the entering of a record of the same in a receiving book until an opportunity is presented for examining them, in order to ascertain if they be complete and in proper form, and fit for registration."

The duplicate certificate of title is something quite apart from the instrument, and the production of the same is under section 41 absolutely essential before the Registrar can be said to be under any obligation to receive or to have any authority to receive the instrument for registration, it being the duty, or at least the right, of the Registrar under such circumstances to reject the mortgage. It must be assumed to be out of his office, and he cannot be held to have any further responsibility with reference to it. The powers conferred upon the Registrar under section 160 (now 148) are primarily for the convenience of the Registrar, and not primarily for the convenience of someone else.

Where a solicitor forwarded a mortgage to the Registrar, but did not forward the duplicate certificate of title, which as a matter of fact was not then in existence, it was held that the mortgage, though retained in the physical possession of the Registrar, yet was not in his possession as Registrar. (*Hall* v. *Registrar of the Yorkton Land Registration District,* 16 W. L. R. 568).

The Registrar has no duty to determine rights as between mortgagee and mortgagor in carrying out the provisions of section 62*a* of the Land Titles

Act, Alberta (*Wiltse* v. *The Excelsior Life Insurance Co.*, 10 W. W. R. 90).

This last decision was adopted by the Master of Titles in Saskatchewan with respect to that province (1917, 1 W. W. R. 302), where it was held that after the registration by a mortgagee of notice of intention to exercise his power of sale, the Registrar has no duty to consider or deal with any informal notice of misrepresentation on the part of the mortgagee, regarding the consideration in the mortgage on which the proceedings are being taken before him, and that he is justified in allowing the proceedings to continue until stopped by the order of the Court, except where he might feel himself unable to move until the disputed questions should be settled by the Court.

In *Ex parte Hussall* (10 S. C. R. N. S. W. 292), it was held that the Registrar, before registering a transfer by a mortgagee exercising his power of sale, is entitled to require proof of the mortgagor's default, having continued up to the time of the sale.

In *Stables* v. *McKay*, 11 N. Z. L. R. 258, it was held that the Registrar should have exercised his discretion by refusing to register the mortgage of a lease, the mortgage containing a covenant to buy all beer contained on the mortgaged premises from the mortgagee during the term of the lease.

In *R.* v. *Registrar-General*, 1 S. C. R. Q. 201, it was held that where an instrument purporting to be a mortgage and substantially in the statutory form, was presented to the Registrar, he was not justified in declining to register it on the ground

that he considered it to contain more than one mortgage.

In *In re Kaihu Valley Railway Co. & Owen,* 8 N. Z. L. R. 522, the Registrar was held wrong in inquiring whether a mortgage from a company presented for registration was *ultra vires* or not. (See also *Mutual Assurance Society* v. *Registrar-General,* 1 Q. L. J. 177, and *In re Registrar-General,* 21 N. S. W. L. R. 225).

The question whether or not the Registrar should accept a document for registration must be determined by the provisions of the Land Titles Act (*Re Ebbing,* 2 S. L. R. 170).

An officer in a position corresponding to a Registrar is not to be deemed a mere machine for making registration (*Manning* v. *The Commissioner of Titles,* 15 A. C. 195; 59 L. J. P .C. 59; *Re Land Registry Act and Shaw,* 8 W. W. R. 1270).

CHAPTER VIII.

Statutory Powers Considered Generally.

In considering the statutory powers given to a mortgagee by the various Acts, an important question has to be solved at the outset, viz.: Are the statutory remedies exclusive or non-exclusive of other powers, conventional or contractual, which may be given to attain the same objects as those aimed at by the statutory powers, but by a different procedure?

Thom, at p. 298 of his work on the Canadian Torrens System, appears to be of the opinion that the statutory remedies are exclusive. He quotes the language of a judgment in *Smith* v. *National Trust Co.*, 20 Man. L. R., at p. 533, when before the lower court: "The Real Property Act creates a method for realizing by sale or foreclosure in case of mortgages under it, which method is clearly meant to be exclusive, unless otherwise permitted by the Act itself. It is a full and sufficient method, and its enactment impliedly repeals as to such mortgages any powers of sale given by the previous Acts, including Lord Cranworth's, if it would otherwise have applied."

"The same rule," infers Thom, "should logically be applied to powers to take possession and lease contained in the same paragraphs of the Act; that is to say, the right to take possession and to make leases must be exercised by the mortgagee pursuant to the provisions of the Land Titles Act, so far as they go, by service and filing of notice.

Furthermore the proceedings under the Act are authorized only in pursuance of a covenant (this remark is, of course, applicable only to Saskatchewan), necessarily implying that without such proceedings under the Act the covenant is unenforceable, and carrying the inference a step further, confirming the view that no other covenants and powers are enforceable by the mortgagee directly, but only through the Courts."

It is difficult to accept this view in all its fulness, as will, it is thought, be shown by an examination of the cases upon the subject.

It has been held in *Re Alarie,* 5 W. W. R. 257, that " In the case of a mortgage under the Real Property Act, the mortgagee having no estate in the land, a final order for foreclosure in an action in the King's Bench does not vest in the mortgagee the estate or interest of the mortgagor. The only way to obtain foreclosure of such a mortgage is under sections 113 and 114 of the Real Property Act (now sections 122-123.)"

This case when examined is not an authority for the proposition that powers must be exercised in pursuance of the provisions of the Acts, where the power sought to be exercised is a conventional one.

It does not go further than to lay down the rule that where the Act prescribes a course of procedure *in the case of a simple mortgage* by which title is to be got in from the mortgagor, that course must be taken.

" Of course," says Howell, C.J.M., " if a special agreement was made between the parties, rais-

ing equities as to title, and perhaps agreements as to conveyance, different questions might arise, but this is a simple mortgage under the new system."

The order in question in the case was, in the words of Howell, C.J.M., a *simple, ordinary* final order in the following words: "That the defendant Hormidas Frechette do stand absolutely debarred, and foreclosed of and from all right, title and equity of redemption in and to the mortgaged premises."

It did not pretend to order or effect a conveyance or transfer of the title, and no case was made out in the pleadings for a conveyance, and there was no contractual or conventional power of sale in the mortgage; consequently, it is impossible to surmise what the judgment of the Court would have been if the order had directed accounts, and that in default of payment of the sum due, the defendant should execute a statutory transfer in favour of the plaintiff, a form that is quite usual in the case of an equitable mortgage by deposit of deeds.

That a statutory foreclosure is the only method of foreclosing of a statutory mortgage is laid down in *Greig* v. *Watson,* 7 V. L. R. Eq. 79, and *Long* v. *Town,* 10 N. S. W. L. R. Eq. 253.

In Canada the authority for a proposition of this nature is an *obiter dictum* of Duff, J., in *Smith* v. *National Trust Co.,* 45 S. C. R. 618, based largely on the *National Bank of Australasia* v. *United Hand-in-Hand Band of Hope Co.,* 4 A. C. 391.

Before considering the proposition in general, it would be well to consider what was actually decided in *Smith* v. *National Trust Co.*

A mortgagor had given a statutory mortgage containing a conventional power of sale by means of covenant *and grant,* "to sell the said lands." The mortgagee exercised this power of sale, and the purchaser claimed in an action against the administrator of the estate of the mortgagor to have it declared that the sale to him was a valid exercise of the power of sale contained in the mortgage deed, and that the *transfer was effectual to give him an estate in fee simple in the land.* The action was dismissed.

It is true that Duff, J., delivering a judgment concurred in by a bare majority of the Court, states that the judicial opinion of the Victoria Superior Court, and that of the Privy Council in the *National Bank* v. *United Hand-in-Hand Co.,* were unanimously in favour of regarding the foreclosure provisions in the Victoria statute as providing the only means by which the mortgagee could extinguish the mortgagor's title, and leans towards the view that proceedings under a conventional power of sale are entirely forbidden.

In the Australian case, Sir James W. Colville, in delivering the judgment of the Judicial Committee, said at p. 405 of the Law Reports' Report, "the company was the registered owner of the land under the provisions of the Transfer of Land Statute, and the mortgage was made under, and subject to the provisions of the 83rd and following sections of that Act, and was duly registered there-

under. The instrument itself is in the form set forth in the 12th Schedule to the Act, except that it contains, as that form permits, a special covenant or agreement, which will be hereafter considered, hence the only way in which the mortgagee could extinguish the rights of the mortgagor in the mine was by foreclosure under 31 Vict. No. 317, of which there is no question here, or by its sale under the 84th, 85th and 87th sections of the Transfer of Land Act."

The report states that the special clause in the instrument of mortgage (referred to *supra*) was to the effect that notwithstanding anything contained in the Land Transfer Act, it should be lawful for the bank in the event of default being made in the payment of the principal money and interest secured, " on such demand being made as aforesaid, immediately to serve such notice of demand as aforesaid, in the manner prescribed by the 84th section of the statute on the company, and after the expiration of fourteen days from the service of the notice of demand, to sell the land, in pursuance of the powers in that behalf vested in the mortgagee under the 85th section of the Act."

It would appear then that the words of the Privy Council, to the effect that the only way in which the mortgagee could extinguish the rights of the mortgagor was by sale under the Act, will be satisfied by supposing them to refer to the circumstances of the case; the circumstances being that, as a matter of fact, the only sale provided for was a sale under the provisions of the Act.

It is not going too far, then, to say that whatever the true state of the law may be on the subject, it has not yet been decided that in Manitoba, the only method of effectuating a sale or foreclosure of lands mortgaged by a statutory mortgage is that provided by the Act.

It is suggested that the true view of *Smith* v. *National Trust* is probably that expressed by Elwood, J., in *Rollefson* v. *Olson,* 8 W. W. R. 481, where he says at p. 485, with reference to the exercise of the power of leasing: "So far as the effect is concerned of *Smith* v. *National Trust Co.* I do not understand that judgment to hold other than that under the facts of that case, the mortgage did not give power to the mortgagee to *transfer the land,* and in my opinion it did not hold that the parties might not so contract that power to give a transfer might be given the mortgagee."

It might be quite possible to accept the statement that the only foreclosure that can be effected by a statutory mortgagee is that prescribed by the statutes, without at the same time accepting it as to sale, taking possession, leasing, etc., on the principle which as to procedure in foreclosure proceedings is laid down in or to be inferred from *Campbell* v. *Commercial Bank,* 2 N. S. W. L. R. 375; *Public Trustee* v. *Morrison,* 12 N. Z. L. R. 425. *In re Barton,* 27 V. L. R. 441, that powers of foreclosure are to be construed more strictly than other powers.

Smith v. *National Trust Co.* may perhaps be taken as an authority that the power of sale given by Lord Cranworth's Act of 1860, applicable to all

charges made to secure loans or debts, cannot be resorted to in the case of statutory mortgages, as the power of sale implied by that Act enabled an equitable mortgagee in fee from a mortgagor who had the legal estate to convey the legal estate upon his exercise of such power. (See *Re Solomon & Meagher's Contract,* 40 C. D. 508).

It is difficult to see why a power of attorney enabling the mortgagee upon the exercise of his conventional power of sale to execute a transfer to the purchaser from him should not be effectual for that purpose; such power of attorney would be given for valuable consideration, and provision is made by the Acts for the registration of powers of attorney. A power of attorney of this nature would, of course, on general principles be irrevocable.

It has been stated that an instrument containing such a creation of agency or power of attorney would fall within the evil aimed at by the full Court of Saskatchewan in *Re Rumley Co.* v. *Registrar, Saskatoon,* L. R. D., and would be rejected on presentation for registration as attempting to combine two instruments of different natures in one (see Thom, Canadian Torrens System, p. 292).

This objection, if it is really valid, might presumably be got over by the registration of the power of attorney as a separate instrument.

The powers of entering into possession and of leasing in Saskatchewan are considered in *Rollefson* v. *Olson and The Mutual Life Assurance Co.,* 8 W. W. R. 481. In that case a mortgagor by his

mortgage deed attorned to his mortgagee at a yearly rental, and by covenant and grant gave the company a power upon default in payment of the principal sum and interest to enter into possession of the land and to lease the same.

The mortgagor fell into default, and the mortgagee entered into possession, and leased the land to the mortgagor for one year, the lease being executed by the mortgagor, but not by the mortgagee.

It was urged on behalf of the plaintiffs in the case (execution creditors) that the company's entering into possession of the mortgaged premises was inoperative and void because the proceedings were not taken in accordance with the provisions of sub-section 2 of section 93 of the Land Titles Act, while the right to take possession and to make leases must be exercised by the mortgagee in accordance with that sub-section, that is, after service and registration of notice.

" This objection is met at the very threshold," says Haultain, C.J., " by the fact that the mortgagor acquiesced in the possession, and leasing by the mortgagee. In any event this is not an objection which concerns the present case. This is not the case of a sale, as in *Smith* v. *National Trust Co.*, 20 Man. L. R. 533; 45 S. C. R. 618; 1 W. W. R. 1122, and the interests of none of the persons to whom notice is required to be given by the above mentioned enactment are in the least affected by the results."

" Under the Act," says Elwood, J., in the same case, " the mortgagee could without consent,

and without taking any further proceedings, enter and lease the land immediately after giving the notice. I cannot see how the respondents would be affected by, or interested in a notice where nothing was sought to be done other than to enter and lease the land. The mortgagor by entering, executing and accepting the lease surely waived any right he had to object to the want of notice. The notice is only necessary in case the assistance of the Act is being invoked by the mortgagee. The right to enter and lease is given in such a case as a right in addition to other rights, but in a case such as the present one, where the assistance of the Act is not being invoked, where nothing is required to be done in the Land Titles Act, and where the mortgagor consents, no notice is in my opinion necessary."

In Alberta and Saskatchewan there are provisions (Alta. s. 70, Sask. s. 103) to the effect that where certain words are used in a mortgage, a fuller form in a schedule in the Acts shall be taken to have been used. There is no doubt that these scheduled forms are the forms appropriate to a mortgage, which professes to be a conveyance of the legal estate, but their inappropriateness to a statutory charge cannot, it is thought, justify their rejection.

These statutory forms seem to be very commonly used. One of the shorter forms which impliedly include the scheduled forms is " will execute such further assurances of the land as may be requisite." The use of this form introduces into the mortgage a covenant that the mortgagor will

make, etc., " all and every such further and other reasonable act or acts, deed or deeds, devices, conveyances and assurances in the law for the further, better and more perfectly and absolutely conveying the said lands, tenements and hereditaments and premises, with the appurtenances unto the said mortgagee, his heirs, executors, administrators and assigns, as by the said mortgagee, his heirs, executors or his or their counsel learned in the law, shall or may be lawfully and reasonably devised, advised or required.

It seems to the writer that some " counsel learned in the law " might well " lawfully and reasonably devise " a plan, upon failure of the mortgagor to pay the mortgage moneys, whereby the Court would direct specific performance of this covenant.

It seems hopeless, here as in many other places in the Acts, to speculate as to what the draftsman could have intended by the inclusion of these sections, but it is, at any rate, difficult to read the covenant as meaning anything else than that upon default the mortgagor will convey the legal estate in the land to the mortgagee.

It is interesting to note that the Land Transfer Commission, 1911, in England, proposed that mortgagees with power of sale should be authorized to transfer the land, and that the registrar should give to the purchaser a certificate of the vendor's power of sale.

CHAPTER IX.

Statutory Leases.

The statutory power of leasing arises in Alberta upon default in payment of the principal sum, interest, annuity or rent charge, or a part thereof, secured by any mortgage or encumbrance registered under the Act, or in case default is made in the observance of any covenant expressed in any mortgage or encumbrance, or declared by the Act to be implied in such instrument, and in case such default is continued for the space of one calendar month, or for *such longer period of time* as may be expressly limited in the mortgage.

It is not clear whether the statutory notice is a condition precedent to exercising the power of leasing, but it is thought that grammatically the section conferring the power, section 62a, owing to the repetition of the word " may " therein, does not postulate such a notice.

In Saskatchewan, the powers are similar, and it is thought that for the same reason, neither a covenant conferring the power of leasing in a mortgage (which in the case of actual entry into possession is a condition precedent) nor the statutory notice need exist before the exercise of the power of leasing.

The power of leasing extends to making a lease of any part of the mortgaged premises; such power would apparently enable a mortgagee in accordance with what is laid down in *Brown* v. *Peto*, [1900] 2 Q. B. 653; 69 L. J. 2 Q. B. 869, to make a lease of any incorporeal hereditament.

It is supposed that a lease when executed under the statutory power would probably have the same effect as if the mortgagor had joined therein, that is to say, would take effect out of the legal estate (See *Wilson* v. *Queen's Club,* [1891] 3 Ch. 525, and *John Brothers Co.* v. *Holmes,* [1900] 1 Ch. 188).

The statutory provision that the mortgagee may make *any* lease of the mortgaged premises *as he may see fit,* is, in terms, of a very extensive nature. It would enable, for instance, if unchecked by the equitable jurisdiction of the Court, a mortgagee to make a lease of the mortgaged premises for 999 years at a pepper corn rent. It is not thought, however, that such an inequitable exercise of the power of leasing would be permitted.

In most of the Australian jurisdictions, there is no provision as to power of leasing, but it has been held that a mortgagee who takes possession may effectually lease for a period to last during the continuance of the mortgage (see *Finn* v. *London Bank of Australia,* 19 N. S. W. L. R. 364).

In Manitoba there is by section 118 of the Act a provision similar to that contained in the Alberta Act, and by section 116, every present and future first mortgagee for the time being has the same powers as he would have had or been entitled to, if the legal estate in the land or term mortgaged had been actually vested in him, with a right in the owner of the land to quiet enjoyment of the mortgaged land until default in the payment of the principal and interest money secured or some part thereof respectively, or breach of covenant.

It seems to have been held in Victoria under a similar provision that, if a time is fixed for pay-

ment of the principal, the right of quiet enjoyment amounts to a re-demise (*Equity Trustees Co.* v. *Ayrey,* 26 V. L. R. 625; *Commercial Bank* v. *Breen,* 15 V. L. R. 572; *Farrington* v. *Smith,* 20 V. L. R. 90), but that, where no such time is fixed, there is no re-demise, and the mortgagor has only a right of action for breach of the implied covenant for quiet enjoyment (Hogg, p. 961).

These decisions seem, however, to neglect the distinction which is drawn attention to in Smith's Leading Cases, vol. 1, 598 (12th ed.), between an agreement to be collected from the mortgage deed that the mortgagor shall remain in possession *for a time certain,* which operates as a re-demise, and an agreement that the mortgagee may enter upon, or the mortgagor hold until a default, *the time of which is uncertain,* which agreement cannot operate as a re-demise for want of certainty (see *Doe* v. *Lightfoot,* 8 M. & W. 564, and *Doe* v. *Day,* 2 Q. B. 147).

The power granted to a mortgagee to lease "whether in or out of possession," presents some difficulties, as the exercise of such a power would, it is thought, amount to a taking of possession; at any rate, in so far as to render a mortgagee so exercising the power of leasing liable to account as a mortgagee in possession.

It is not without significance that most of the Australian statutes enable the mortgagee to enter into possession *by* taking the rents and profits, and the Canadian Acts provide for entry into possession of the land *and* a receipt and taking of the rents and profits.

Tenants of the mortgaged premises, upon the exercise of the power of receiving the rents of the mortgaged property, would probably be entitled to notice of such entry, whether they held by registered leases or not. (See *Bank of N. S. W.* v. *Palmer,* 2 N. S. W. L. R. 125, and *Equity Trustees Co.* v. *Ayrey,* 26 V. L. R. 625).

Possession can be obtained by an action of ejectment in the ordinary way (see Alta., section 104, Sask., section 136, and Manitoba, section 84, providing for recovery of the land by that process in the case of a mortgagee against a mortgagor).

The case *Oelkers* v. *Merry,* 2 S. C. R. (Q.) 193, presents the solution of a curious problem. That case decided that the words "as against a mortgagor" could be treated as mere surplusage, and that the action of ejectment might be brought against any person in possession and need not be against a defaulting mortgagor or his tenant. The plaintiff was the representative of a mortgagee, and the defendant was not the mortgagor or his representative, but a stranger claiming under an adverse title, that is, a subsequently registered certificate of title, and it was held that although the defendant did not represent the mortgagor, the action lay against him at the suit of a mortgagee entitled to possession.

It is presumed that in the Acts the words "action of ejectment" have no technical meaning and are simply a *varia lectio* for an action for the recovery of land. (See further as to these proceedings for obtaining possession of the land, *Colonial Bank* v. *Rabbage,* 5 V. L. R. 462; *Commercial Bank* v. *McGaskill,* 23 V. L. R. 10).

CHAPTER X.

Power to Take Possession.

A mortgagee by the conveyance of the legal estate, or by conveyance of the equity of redemption, has the right to take possession of the mortgaged land, even prior to any default, especially, in the latter case, if the mortgage gives him that right. (See *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Company,* 74 L. J. K. B. 799; *Campion* v. *Palmer,* 1896, 2 I. R. 445; *General Finance Co.* v. *Liberator Building Society,* 10 C. D. 15, at 24; *Antrim County Land Company* v. *Stewart,* 1904, 2 I. R. 357.)

A puisne mortgagee, being entitled under his mortgage to take possession, served notice on the tenants to pay their rents to him, and it was held that a judgment obtained against the mortgagor after service of the notice could not be enforced by garnishee proceedings against the rent. (*Campion* v. *Palmer,* 1896, 2 I. R. 445. See also *Antrim Land Co.* v. *Stewart,* 1904, 2 I. R. 357).

Ashburner on Mortgages doubts the right to take possession on the part of an equitable mortgagee, but the statement in the text seems most consonant with principle, though an equitable mortgagee by mere charge cannot take possession of the land (per North, J., in *Garfit* v. *Allen,* 57 L. J. Ch. 420), save where a contractual right is given.

It appears from these cases that a contractual right to take possession given in a Torrens mort-

gage should be considered as effectual (see also *Rollefson* v. *Olson,* 8 W. W. R. 481), and that whether the right to possession is to arise upon default or prior thereto.

Where a mortgagee is entitled to possession, which he *prima facie* is by a conveyance of the legal estate by way of mortgage, he can gain possession either by actual entry upon the land, if this can be done peaceably, or by bringing an action to recover possession of the land, or by giving a tenant of the mortgaged land notice to pay the rent to him, where such property is in the occupation of a tenant whose tenancy is binding upon him (see *Ocean Accident and Guarantee Cor.* v. *Ilford Gas Co.,* [1905] 2 K. B. 493).

The statutory right of possession in Alberta and Saskatchewan is given upon default of payment of mortgage moneys or interest or non-observance of express or implied covenants continued for one calendar month or any longer contractual period, and after notice given. (Alberta section 62a; Saskatchewan 93 (2).)

In Manitoba the right of entry into possession of mortgaged land given by section 114 is in terms confined to entry into possession by receiving the rents and profits thereof or by bringing an action to recover the land, either before or after receiving the rents and profits thereof, and may be exercised apparently without notice. By section 118, the mortgagee has a right of possession similar to that in Alberta and Saskatchewan. The proceedings for obtaining possession may apparently be taken

either against the mortgagor or against a third party (see *Oelkers* v. *Merry,* 2 Q. S. C. R. 193).

A mortgagee who enters into possession of the mortgaged property, since he thereby does what amounts to taking proceedings to recover his mortgage money, deprives himself of his equitable right to insist on six months notice or interest in lieu of notice from a person seeking to redeem the mortgage, and where a person takes possession he may be redeemed before the time limited by the mortgage for payment of the mortgage money expires (*Bovill* v. *Endle,* [1896] 1 Ch. 248, 65 L. J. Ch. 542, followed by Stuart, J., in *Great West Permanent Loan Co* v. *Jones,* 7 W. W. R. 767; see also *Edmonson* v. *Copland,* [1911] 2 Ch. 301), though the mortgagor could not, before the time limited for payment to the mortgagee expires, either insist on acceptance of a tender of the mortgage money or take proceedings to redeem (*Brown* v. *Cole,* 14 Sim. 427).

Other drawbacks to taking possession are the strict accountability to which a mortgagee in possession is held, and the fact that it is extremely doubtful as to whether a mortgagee after he has once taken possession can relinquish it (*Re Prytherch,* 42 C. D. 600), though the Court might, but only in exceptional cases, extricate him from this difficulty by the appointment of a receiver: (*County of Gloucester Bank* v. *Rudry Mertiyr Colliery Company,* [1895] 1 Ch. 629).

A mortgagee may take possession either of the whole or part of the mortgaged premises as in *Simmins* v. *Shirley,* 6 C. D. 173, where a farm was

let to a tenant without either the shooting or the timber, and a notice to the tenant to pay rent to the mortgagee was held only to amount to taking possession of the farm (see also *Soar* v. *Dalby,* 15 B. 156). It is stated in *Berard* v. *Bruneau,* 8 W. W. R. 635, that in *Kinsman* v. *Rouse,* 17 C. D. 104; 50 L. J. Ch. 486, Jessel, M.R., held that possession by a mortgagee of any part of the lands comprised in the mortgage operated as possession of the whole. Reference to the latter case does not however completely bear out this statement, the point of the case being that the mortgagor was debarred from redemption by lapse of time as to one part of the mortgage and not as to another.

He may, however, obtain possession of the whole of the property provided that the property is so bounded and defined that entry on part can be regarded as entry on the whole (see *Low Moor Co.* v. *Stanley Coal Co.,* 34 L. T. 186—C.A.)

He may make forcible entry at the risk of a criminal prosecution (5 Richard 2 st. 1, c. 8); or of having to pay damages for injury to the occupier, his family or his furniture (see *Beddall* v. *Maitland,* 17 C. D. 174, at 187, and *Edwick* v. *Hawkes,* 18 C. D. 199).

The receipt of rents constitutes a taking of possession, as a rule, but not the mere asking for them without receiving them (see *Ward* v. *Cartar,* 35 Beavan 171). To make him a mortgagee in possession he must receive the rents and profits in such a way as to take upon himself and to take out of the hands of the mortgagor the power and

the duty of managing the estate and collecting the rents.

Mere insurance of the mortgaged property or merely making arrangements with the tenants, if they do not recognize him as their landlord, will not constitute the mortgagee a mortgagee in possession (*Ward* v. *Cartar, supra*).

It is presumed that the power to take possession is limited and could not operate in such a case as where an unpaid vendor is in possession of mortgaged property by agreement with the mortgagor, until the purchase money is paid. See *Commercial Bank* v. *McGaskill,* 23 V. L. R. 10, and *Colonial Bank* v. *Rabbage,* 5 V. L. R. (L.) 462.

CHAPTER XI.

Sale Under Registrar.

A notice is a condition precedent to the exercise of the power of sale under the Acts.

The provision in Saskatchewan, section 93 (2) provides that the notice shall be written and that a copy shall be filed in the Land Titles Office. The notice may require payment within the time to be specified or observance of covenants, and is to state that all remedies competent will be resorted to unless the default in payment or in observance of the covenant be remedied.

In Alberta the notice shall contain a statement that in case default continues for two months from the date of service of the notice, the mortgage lands may be sold, and may require payment of the moneys due or observance of the covenants, and may declare the intention of applying for foreclosure: s. 62a (2), (3), (4).

Provisions similar to those of Saskatchewan are contained in the Manitoba Act, section 118.

Where formal demand of payment which is a necessary precedent to a power of sale has been made, the mortgagee may as well after as before the occurrence of actual default, by his conduct in negotiations with the mortgagor, estop himself from alleging that the demand has ever been made. In such a case a fresh demand must be made before a mortgagee can be heard to allege that default has been committed. (*Barns* v. *Queensland National Bank, Ltd.*, 3 C. L. R. 925).

It appears that the period of continuance of default in payment or in the observance of any covenant, may be waived (see *Public Trustee* v. *Morrison,* 12 N. Z. L. R. 423). As to waiver of notice see generally *Thompson & Holt,* 44 C. D. 492; *Campbell* v. *Commercial Bank,* 2 N. S. W. L. R. 375; *Wilson* v. *McIntosh,* [1894] A. C. 129; *National Bank of Australasia* v. *United Hand-in-Hand Co.,* 4 A. C. 391, and *Van Damme* v. *Bloxam,* 9 S. A. L. R. 27.

It might, indeed, be said that under the New Zealand Act, it is settled law that the power of sale and the conditions of its exercise are now matters of contract between the parties, and that the implied powers may be varied at the will of the parties. (See *Miles* v. *Hussey,* 28 N. Z. L. R. 382).

It seems to be the practice in Australia to abbreviate by the terms of the mortgage the time for which default must continue and notice must be given.

Where seven days notice was provided for in the mortgage, and the mortgagee gave notice that the land would be sold unless the money due under the mortgage be forthwith paid, it was held that the notice was invalid, as not showing whether both principal and interest were demanded, and as failing to give the necessary seven days for repayment. *MacDonald* v. *Rowe* (3 A. J. R. 90 and 4 A. J. R. 134).

Where too large a sum is demanded the notice is not necessarily rendered invalid, and the mortgagor must still offer to pay the amount due.

It has been held that a notice of demand may be given before registration of the mortgage though registration must be effected before the sale actually takes place (*Matheson* v. *Mercantile Finance & Agency Co., Ltd.,* 17 V. L. R. 271).

Where a demand was made for payment of the money owing, after default had been made in payment of interest, it was held that such demand intimated a willingness on the part of the mortgagee to receive his principal, although the date fixed for its payment had not arrived, and accordingly, on payment of the principal and the interest then due, could not demand the payment of future interest (*Ewart* v. *General Finance, etc., Soc. of Australasia,* 15 V. L. R. 625).

A notice that a mortgagee intends to exercise his power of sale owing to non-observance of covenants contained in the mortgage should specify which covenants are alleged to be broken (*Stacy* v. *Hansen,* 20 V. L. R. 561).

Under the provisions of the English Conveyancing Act of 1881, which require a lessor to serve on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy applying to him to remedy it, it has been held that the notice must be so distinct as to direct the attention of the tenant to the particular thing of which the landlord complains, so that the tenant may be able to remedy the breaches before an action to enforce the forfeiture is commenced (*Fletcher* v. *Nokes,* [1897] 1 Ch. 271; *Re Serle,* [1898] 1 Ch. 652).

The notice is not bad if it includes breaches which have not been committed (*Matthews* v. *Usher,* [1900] 2 Q. B. 535; *Pannell* v. *City of London Brewery Co.,* [1900] 1 Ch. 496); but it is bad if it claims for breaches of covenant which are not in the lease (*Guillemard* v. *Silverthorn,* 99 L. T. 584), or refers to the wrong covenant (*Jacob* v. *Down,* [1900] 2 Ch. 156).

The notice need not specify the acts which the lessee must do in order to repair a breach of covenant (*Piggott* v. *Middlesex County Council,* [1909] 1 Ch. 134). The notice may be addressed to " the lessee " or to " the lessee and other persons interested " (see *Cronin* v. *Rogers,* Cab. & El. 348).

Upon a sale under the registrar, the purchase money is to be applied, first, in payment of the expenses incurred by the sale, second, in payment of the money which may then be due or owing to the mortgagee, thirdly, in payment of the subsequent mortgages, incumbrances or liens, and fourthly, the surplus is to be paid to the mortgagor (Alberta, section 62a; Saskatchewan, section 92 (4); Manitoba section 120). As to Alberta, see Memo.

It is presumed that a mortgagee would be entitled to retain proper and just allowances (see *National Bank of New Zealand* v. *Barclay,* 17 N. Z. L. R. 819), see Memo. at end of book.

The provision that only moneys which may then be due or owing to the mortgagee are to be paid to him, seems likely to cause difficulty where the statutory procedure is set in motion upon a non-payment of some part of the principal sum,

or of interest, or upon non-observance of a covenant.

In Alberta provision is made for the payment into Court of the surplus moneys, if payment cannot be made to the mortgagor, etc., but there are no analogous provisions in Manitoba or Saskatchewan. (See Memo. at end of chapter).

In *Thompson* v. *Berglund,* 16 W. L. R. 154, where land was sold by a mortgagee under section 103 of the Land Titles Act, and the surplus after payment of expenses and the amount due to the mortgagee was paid into Court, and claimed by several execution creditors as subsequent incumbrancees, it was held that the provision of sub-section 4 of the section, to the effect that the subsequent incumbrances should be paid in the order of their priority, was controlled by the provision of section 3 of the Creditors Relief Ordinance, declaring that there should be no priority among creditors by execution, and that, therefore, the money should be distributed among the execution creditors in equal shares (see *Dawson* v. *Moffatt,* 11 O. R. 484, and *Re Bokstal,* 17 P. R. 201).

In *Edmonton Mortgage Co.* v. *Gross,* 18 W. L. R. 385, where land was sold under a judgment in a mortgage action and there was a surplus, after paying the claim of the plaintiff, the first mortgagee, sufficient to pay in full the amounts of three executions against the defendant, the registered owner and the amount of a second mortgage registered after the three executions were lodged, but not sufficient to pay in full as well

the amounts of several executions lodged after the second mortgage, it was held that the three intervening execution creditors were entitled to be paid in full instead of *pari passu* with the subsequent execution creditors (see *Roach* v. *McLachlan,* 19 A. R. 486; *Breithaupt* v. *Marr,* 20 A. R. 689; *Re Massey,* 2 Terr. L. R. 84, and *Howard* v. *H. R. Trading Co.,* 4 Terr. L. R. 109).

In *J. I. Case Threshing & Machine Co.,* 19 W. L. R. 701, it was suggested by Wetmore, C.J., that the duty of distributing the surplus moneys was intentionally cast upon the mortgagee by the statute, and that he could not escape that duty by paying the money into Court. If after reasonable inquiry, he is unable to ascertain the amount due to the subsequent incumbrancer, or if some doubtful question arises, he would be justified in paying the money into Court, but his duty would not end there. It would then be open to him to apply to the Court under section 49 of the Trustee Act, and Rule 481 of the Rules of Court (Sask.).

In *Gilbert* v. *Ullerich,* 17 W. L. R. 157, certain persons claiming under a covenant to give a mortgage upon lands which had been sold, claimed to be subsequent incumbrancers, so as to be entitled to be paid out of the proceeds of the sale, through having registered their equitable mortgage by way of caveat. It was held, however, that until they established in an action that they had a lien on the land by virtue of the agreement, they could make no claim whatsoever upon the moneys in Court.

The duty of the Registrar in conducting the sale was considered by Harvey, C.J., in *Re Sun*

Life Assurance Co. & Widmer, 9 W. W. R. 961, where he lays down that where a mortgagee gives notice under section 62a of the Land Titles Act, Alberta, the Registrar, upon application to him for direction for a sale of the mortgaged land, is entitled to require the production of (*a*) an affidavit of default, and continued default; (*b*) an affidavit of value of the property; (*c*) a statement of the amount due under the mortgage, with an estimate of the cost of sale proceedings, taxes, etc.; (*d*) a reserve bid form, and (*e*) instructions to auctioneer, in order that he may be satisfied (*a*) that the mortgagee is entitled to offer the lands for sale, and (*b, c* and *d*) that he may settle a reserve bid, and (*e*) that he may be sure that the sale will be conducted in accordance with the conditions.

The statement at p. 329 of Thom on the Torrens System to the effect that the fixing of a reserved bid is not a matter for the registrar is disapproved of.

Under the provisions of the New Zealand Act relating to a sale under the conduct of the Registrar of the Supreme Court, it has been decided that the Registrar has no power to fix a reserve price (*Hamilton* v. *Bank of New Zealand,* 24 N. Z. L. R. 371).

In *Re Sun Life Assurance Co.* the history of the power of sale is outlined.

When the Torrens system was first introduced into the North-West Territories, in 1886, the power of sale was given by the statute instead of by the mortgage, but it was in much the same terms as is

usually given by the mortgage, and it was authorized to be exercised without supervision.

It is probably true that the Registrar, before registering a transfer from a mortgagee to a purchaser, had both a right and duty to see that the mortgagee had the right to make the sale, but the method and the conditions of the sale were left practically entirely in the hands of the mortgagee.

When the Land Titles Act, 1894, chapter 28, was passed a new principle was applied. The power of sale was still given, but was not permitted to be exercised without supervision. The Registrars of land titles were still the persons who had been Registrars of deeds under the old system before 1886, and the power of supervision was not given to them, but reposed in a Judge. It was only subject to the direction of a Judge that a sale could be made, and a sale could only be made subject to the conditions he imposed, and the transfer from the mortgagee could only be registered when the sale had been confirmed by a Judge.

As the proceedings were thus in fact before a Judge, it probably being considered that they might as well be so in name also, in 1898 another change was made, and the power of sale given by the statute was wiped out entirely, and the mortgagee was required to resort to the Court to obtain a sale.

Though there was no statutory provision that a mortgagee under the statutory mortgage of the Act should have the same rights as a mortgagee under the old mortgage deed, yet the Courts applied in a general way the proceedings under the old mortgage, and that practice continued until

last year (1915), when the present provisions contained in section 62a were first enacted.

In 1908 the Judges of the Court formulated certain rules of practice for mortgage actions. It was pointed out that as the mortgage was only a security, the mortgagee's right was in the first instance a right of sale, and not as under the old mortgage a right of foreclosure, which term, though scarcely appropriate, has continued to be applied to our mortgage proceedings.

In essentials the provisions of the Act are now back to what they were under the Act of 1894, before its alteration. The fact that the person designated in that Act as supervisor was a Judge instead of a Registrar is unimportant; his powers and duties were conferred upon him by the Act, and did not exist by virtue of his being a Judge of the Court.

In *Re Sun Life Assurance* v. *Widmer,* 9 W. W. R. 961, Harvey, C.J., seems to disapprove of the proposition that a contractual power of sale may take the place of that conferred by the Statute, but the point seemed not to have arisen in the case, and the language of the learned Judge is at least ambiguous.

Where land has been knocked down to a purchaser at a mortgage auction sale held under the order of the Registrar, the deposit paid, and the conditions of the sale signed, but the contract has not been carried out, the Registrar has no power to direct a resale, or to deal further with the land, excepting under the direction of the Court (*Re Duty of Registrar in Mortgage Proceed-*

ings, 1917, 1 W. W. R. 331 (Sask.)), but after an abortive sale he may apparently ratify a private sale which has been made without notice, and without authority, if he is reasonably satisfied that the mortgagor has no beneficial interest in the lands (*Re Sale of Mortgaged Lands by Private Contract,* 5 W. W. R. 1328 (Sask.)).

The failure to serve a person who joined in the covenants of a mortgage with notice of mortgage proceedings is not fatal to the proceedings, but the Registrars are instructed that the name of the co-covenantor should be mentioned in the memorandum of registration of the mortgage on the title, and the Registrar is justified in requiring service of notice of intention to exercise the power of sale, and all subsequent proceedings, on such co-covenantor, unless the mortgagee has consented to waive his rights on the covenants against the co-covenantor (*Re Co-covenantors & Merger,* 1917, 1 W. W. R. 1084 (Sask.)).

The Registrar is justified in refusing to merge any mortgage in the title, even if requested to do so, as the doctrine of merger, in the opinion of the Master of Titles, does not fit in with the Torrens System, and while a practice has grown up in the province of merging caveats on the title passing to the caveator, at the request of the parties interested, there should be no extension of the practice to other instruments, such as mortgages (S.C.).

A right to receive notice of intention to exercise the power of sale has been held in Australia to be capable of waiver (In *Campbell* v. *Commercial Bank,* 2 N. S. W. R. 375; *Public Trustee* v.

Morrison, 12 N. Z. L. R. 423, and *Wilson* v. *MacIntosh,* 1894, A. C. 129; 63 L. J. Ch. 49).

In the last cited case the respondent lodged an application in the office of the Registrar-General to bring certain land under the Act N. S. W., and the appellant filed a caveat, but took no proceedings to establish her title. More than three months after lodging the caveat the respondent stated a case for the opinion of the Supreme Court, and obtained an order of the Court directing the appellant to state a case on her behalf. On subsequent motion by the respondent to have the caveat set aside on the ground that the appellant had failed to take proceedings within three months after the filing of the caveat, the Privy Council held that he had waived the lapse by stating a case, and applying for an order for the appellant to state her case. " Their Lordships," runs the judgment, " are of opinion that the maxim *quilibet potest renunciare juri pro se introducto* applies to this case, that it was competent for the applicant to waive the limit of three months, and the lapse of the caveat by section 23, and that the respondent did waive it by stating a case and applying for and obtaining an order upon the appellant to state her case, both which steps assumed and proceeded on the assumption of the continued existence of the caveat." Their Lordships quoted with approval the observations of the Chief Justice of N. S. W.: " It is to my mind a clear principle of equity, and I have no doubt there are abundance of authorities on the point that equity will interfere to prevent the machinery of an Act of Parliament being used

by a person to defeat equities which he has himself raised and to get rid of a waiver created by his own acts."

It has been held that the power of sale contained in a mortgage under the Land Transfer Act of 1908, N.Z., does not include a power to exchange (*Taylor* v. *Parkinson,* 31 N. Z. L. R. S. C. 354).

There is considerable distinction between the powers of sale conferred by the Australian Acts and those given in Canada, in which the mortgagee is given power to sell upon such terms as he may think fit, a distinction which has been drawn attention to by Harvey, C.J., in *Re Sun Life Assurance Co.* v. *Widmer,* 9 W. W. R. 961. In this case he says: "The title can be transferred from one person to another only by the act of the Registrar, and an assurance fund is provided to which recourse may be had in case the Registrar makes a mistake and deprives someone improperly of his land. It is apparent then that while a purchaser, or any person subsequently dealing with the land, under the old system must satisfy himself and take the chances of the power of sale having been properly exercised, under the new system he may place implicit reliance on the act of the Registrar which insures his title."

Under the New Zealand Act it has been held that a mortgagee is not a trustee for the mortgagor of the power of sale, though he must exercise the power in good faith (see *Miles* v. *Hussey, ante*).

A mortgagee under the Victorian Acts is bound to take reasonable means to obtain a fair price

(*Gunn* v. *Land Mortgage Bank of Victoria,* 12 A. L. T. 49).

He cannot sell for a lump sum land comprised in a statutory mortgage and other land (*Ross* v. *Victorian Permanent Building Society,* 8 V. L. R. (Eq.) 254); nor (*semble*) several pieces of land mortgaged by different mortgages by one mortgagor.

The registration of a transfer executed for the purposes of the sale vests the interest of the owner of the property in the purchaser, discharged "from any mortgage lien, charge or encumbrance created by any instrument registered subsequent thereto."

Under the New Zealand Act, which provides that the registration of a transfer passes the interest of the mortgagor discharged from all liability on account of "any estate or interest registered subsequent thereto," it was held that, if the mortgagee sells expressly subject to a term of years created subsequently to the mortgage by the mortgagor, the purchaser cannot avoid the term: *Thomson* v. *Finlay* (1886), N. Z. L. R. 5 S. C. 203.

It ought to be noticed in this connection that the interest of the mortgagor at the time of the sale in the mortgaged premises may be greater than it was at the time of the mortgage (see *Smith* v. *Davy,* 2 N. Z. L. R. S. C. 398).

A purchaser from the mortgagee is not to be answerable for the loss, misapplication or non-application, or be obliged to see to the application of the purchase money by him paid, nor shall he

be obliged to inquire as to the fact of any default or notice having been made or given as aforesaid, or how the purchase money to arise from the sale of any such land, estate or interest shall be applied (Alta. s. 62a (7), Man. s. 120, Sask. s. 93 (4).

It seems to be by no means clear to whom the protection given by these clauses will extend.

Will a purchaser who receives notice of the absence of some of the conditions precedent before his transfer is registered, be entitled to compel his own registration, or if registered, will he then have a title, which is perfect as against the mortgagor? No doubt he could pass a perfect title to another.

In *McDonald* v. *Rowe,* 3 A. J. R. 90, Molesworth, J., thought that a purchaser was protected from the date of his contract, but he afterwards doubted the truth of this dictum in *Ross* v. *The Victorian Permanent Building Society,* 8 V. L. R. (Eq.) 254 at 265.

A purchaser who has been registered is protected by the section (*Jones* v. *Sellick,* 6 S. A. L. R. 13; *Van Damme* v. *Bloxam,* 9 S. A. L. R. 27).

See further as to the date of the commencement of protection: *Public Trustee* v *Arthur,* 25 S. A. L. R. 78 (date of contract); and *contra, Cowell* v. *Stacey,* 13 V. L. R. 84, and *George* v. *A. M. P. Society,* 4 N. Z. L. R. S. C. 165.

This vesting of the interest of the owner is to take place *upon the registration* of the instrument of transfer: (Man. s. 121; Sask. s. 93 (5); Alta. s. 62a (9)), and, accordingly, it has been said that

the policy of the Act (Vict.—a similar provision) is to give security to transferees whose titles have been completed by the issue of new certificates, but not before (*London Chartered Bank of Australasia* v. *Hayes,* 2 V. R. (Eq.) 104; see also *Kickham* v. *The Queen,* 8 V. L. R. (Eq.) 1, 250). As to execution after abortive sale in Alberta, see note at end of book.

In *Ex parte Hassall,* 10 S. C. R. (N.S.W.) 292 at 299, it was said that before registering a transfer from the mortgagee to the purchaser at a statutory sale, there should, where the money is payable on demand, be proof of the demand having been made and of default having happened and continued, and also of service of the statutory notice.

The N. S. W. statute, however (s. 9), directs registration upon proof, "that such default has been made and continues."

See further: *National Bank of Australasia* v. *Hand-in-Hand, &c., Co.,* 4 A. C. 391 at 407.

[MEMO:—By amendment 1917 in Alberta the purchase moneys received under a sale under the Registrar, the money is paid directly into Court, and the surplus after paying costs and the mortgagee is paid out on a judge's order to subsequent mortgagees, etc., and to the owner or beneficial owner as his interest may appear.]

CHAPTER XII.

Express Power of Sale.

A mortgagee must not be regarded as a trustee of the power of sale, and his exercise of the power will not be interfered with by the Court, provided he has exercised his power *bona fide* (the existence of which *bona fides* is to be decided by all the circumstances of the case), for the purpose of realizing his security, and has taken reasonable precautions to secure a proper price (see *Jenkins* v. *Jones,* 2 Giff. 99; *Farrar* v. *Farrars, Ltd.,* 40 C. D. 395; *Kennedy* v. *de Trafford,* [1897] A. C. 180, and *Nutt* v. *Easton,* [1899] 1 Ch. 873).

The motive of the mortgagee is immaterial (*Nash* v. *Eads,* 25 Sol. Jo. 95, but see *Pooley's Trustee* v. *Whetham,* 33 C. D. 111). A sale may be made on the terms that the whole money may remain on a mortgage, and the mortgagee can sell on credit (*Thurlow* v. *Mackeson,* 4 Q. B. 97; *Farrar* v. *Farrars, Ltd., supra,* and *Lockhart* v. *Yorkshire Guarantee and Securities Corporation, Ltd.,* 14 B. C. R. 28).

The sale may be set aside if there has been fraud or conduct amounting to fraud, *e.g.,* if the price has been so low as to be in itself evidence of fraud (*Nutt* v. *Easton,* [1900] 1 Ch. 29; *Warner* v. *Jacob,* 20 C. D. 220; *Bettyes* v. *Maynard,* 31 W. R. 461; *Haddington Island Quarry Co.* v. *Huson,* [1911] A. C. 722, and *Canada Permanent Mortgage Corporation* v. *Jesse* (sale for 25 cents), 11 W. L. R. 295). The mere fact that the sale is disadvantageous is insufficient to warrant interference by the

Court (*Colson* v. *Williams,* 58 L. J. Ch. 539, and cases *supra*).

The consequence, however, of not selling with proper precaution, is that the mortgagee will be charged in taking the accounts, with any loss that results from such want of precaution (*Wolff* v. *Vanderzee,* 17 W. R. 547). See also as to negligence *Carruthers* v. *Hamilton,* 12 Man. L. R. 60, and for a case of a mortgagee trying to take advantage of his own negligence, see *Fox* v. *Hunter,* 12 W. L. R. 87.

The mortgagee selling under a power as distinct from a mortgagee selling under the Land Titles Act, etc., is entitled to insert what conditions of sale he may please, if such conditions of sale are ordinary ones (*Falkner* v. *Equitable Reversionary Soc.,* 4 Drew, 352; *Kershaw* v. *Kalow,* 1 Jur. N. S. 974).

He may employ agents if he selects such as are presumably competent, though he may be liable for a serious blunder on the part of the agent (*Tomlin* v. *Luce,* 41 C. D. 573).

A mortgagee cannot sell to himself, nor to himself and others, nor to a trustee for himself (*Downs* v. *Grazebrook,* 3 Mer. 200; *Robertson* v. *Norris,* 1 Giff. 421; *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Co.,* 4 A. C. 391; *Astwood* v. *Cobbold,* [1894] A. C. 150; *Farrar* v. *Farrars, Ltd.,* 40 C. D. 395; *Mitchell* v. *Rutherford,* 12 W. L. R. 55).

The mortgagee cannot sell to an agent, *e.g.,* the officer of a company who is a mortgagee, and who

is concerned with the conduct of the sale, or to a solicitor who has the conduct of the sale (*Whitcomb* v. *Minchin,* 5 Madd. 91; *Orme* v. *Wright,* 3 Jur. 19; *Re Bloye Trust,* 1 M. & G. 488; *Martinson* v. *Clowes,* 21 C. D. 857; *Hodson* v. *Deanes,* [1903] 2 Ch. 647; *Nutt* v. *Easton,* [1899] 1 Ch. 873).

A second mortgagee may purchase the property on his own account from the mortgagee, whether he is in possession or not (*Kirkwood* v. *Thompson,* 2 DeG. J. & Sm. 613; *Kennedy* v. *De Traford,* [1897] A. C. 180; *Union Bank* v. *Bates,* 6 W. W. R. 170).

Where a first mortgagee has notice of claims of subsequent incumbrancers, he is liable for paying these surplus proceeds to the mortgagor (*W. London Commercial Bank* v. *Reliance Permanent Bldg. Soc.,* 29 C. D. 954).

A proviso in a power of sale which relieves a purchaser from enquiry as to any irregularity does not protect him where he knows of an irregularity; at any rate if that irregularity is one which could not be waived (*Selwyn* v. *Garfitt,* 38 C. D. 273).

Sale in Lieu of Foreclosure.

Under the Chancery Procedure Amendment Act, 1852, there is a statutory jurisdiction to direct a sale instead of foreclosure, on the request of the mortgagee or of any person interested either in the mortgage money or the equity of redemption, but such request is a condition precedent to the exercise of the power of granting a sale (*Canada Life Assurance Co.* v. *Vance,* 12 W. L. R. 231; *Colonial Investment Co.* v. *Weine,* 7 W. W. R. 672;

see also *Excelsior Life* v. *Prestniak,* 1 Sask. L. R. 215).

It has been held in *Credit Foncier* v. *Schultz,* 10 Man. L. R. 158, that the Court has no power to direct the sale of mortgaged property after foreclosure has been ordered, without the consent of the defendant, although it be shown that the mortgaged premises are not worth the amount due under the mortgage.

After an order nisi for foreclosure has been made, the Court may direct sale (*J. I. Case Co.* v. *Preston,* 12 W. L. R. 12, following *Union Bank of London* v. *Ingram,* 20 C. D. 464; *S. W. District Bank* v. *Turner,* 31 W. R. 113, and *Weston* v. *Davidson,* W. N. 1882, p. 28, the last case deciding that where an application to enlarge the time for payment is pending, the sale may be ordered on motion for foreclosure absolute).

An order for foreclosure absolute may be made after an order for sale (*Lloyd's Bank, Ltd.* v. *Colston,* [1912] W. N. 6).

This last mentioned power to order a sale is exercised where the primary remedy on the security is foreclosure, but in other cases a sale may be ordered under the general jurisdiction of the Court, as the appropriate method of enforcing the security, as for instance where the security is unprotected: *MacKenzie* v. *Robinson,* 3 Atk. 559, or is deficient: *Kinnoul* v. *Money,* 3 Swan 202n., or where the mortgagee is also the trustee of the equity of redemption: *Tennant* v. *Trenchard,* 4 Ch. 537, or unless the mortgagee has or is entitled to have a

mortgage containing a power of sale: *Lister* v. *Turner,* 5 H. 281; *Woof* v. *Barron,* 1873, W. N. 71.

Under Lord Cranworth's Act, 1860, the power of sale was given in the case of mortgages or charges made to secure loans or debts, and under it the mortgagee had power to convey the property sold for all the interest which the mortgagor had power to dispose of, with power to call for the title deeds and to call for a conveyance of the legal estate if it was outstanding in a trustee for the mortgagor, so that an equitable mortgagee in fee from a mortgagor who had the legal estate could convey the legal estate (*Re Solomon and Meagher's Estate,* 40 C. D. 508), or a mortgagee of leaseholds by sub-demise could convey the entire residue of the term (*Hiatt* v. *Hillman,* 19 W. R. 694).

It does not appear that where no express provision is made as to notice there need be any notice given of the intention to exercise the power of sale; thus in the *Dominion Trust Co.* v. *Bower,* 3 W. L. R. 157, Irving, J., held that he was unable to deduce from the authorities any equity under which a sale under a power of sale in a mortgage, silent on the question of notice, when no notice had been given either to the mortgagor or a second mortgagee, could be held to be invalid.

However this may be, it has been held that where the power of sale is made exercisable at any time after default, such a provision may be considered as oppressive (see *Miller* v. *Cook,* 10 Eq. 641); though it would not be considered as oppressive where the mortgage is to secure an exist-

ing debt which is being pressed for, or where the subject matter of the mortgage is hazardous (*Pooley's Trustee* v. *Whetham,* 33 C. D. 111 C. A.).

Where the power is exercisable on demand, reasonable time must be allowed to the mortgagor to comply with the demand (*Rogers* v. *Mutton,* 7 H. & N. 733).

As to what amounts to sufficient notice see *Lockhart* v. *Yorkshire Guarantee & Securities Cor. Ltd.,* 9 W. L. R. 182, and for a case where there was no notice, but the mortgagor stood by and let the sale proceed, see *Campbell* v. *Imperial Loan Co.,* 8 W. L. R. 501.

Where a sale was made for 25c., it was set aside (*Canada Permanent Mortgage Co.* v. *Jesse,* 11 W. L. R. 295).

The sale is good though it does not profess to be made under the power (*Lockhart* v. *Yorkshire's Guarantee & Securities Cor. Ltd., supra*).

As to sale before foreclosure absolute, see *de Beck* v. *Canada Permanent Mortgage Cor.,* 4 W. L. R. 91, and *Williams* v. *Sun Life Assurance Co.,* 19 W. L. R. 564.

Leave to bid at a sale by the Court should not be given to a mortgagee or other person who is selling land to realize a lien, and who has the conduct of the sale, save under very special circumstances; generally speaking, where a man's duty and interest in respect of purchase conflict, he cannot become the purchaser of the thing sold (*Crown Life Insurance Co.* v. *Clarke,* 9 W. W. R.

333; *Griesbach* v. *Hogan,* 8 W. W. R. 356, disapproved).

In *Dakota Lumber Co.* v. *Rinderknecht,* 1 W. L. R. 481, it was stated that leave to bid is never refused to the plaintiff.

Where the mortgagee sells under a power, he is not precluded from suing on the covenant for payment in the event of the sale not realizing enough to pay off the mortgage (*Rudge* v. *Richens,* 8 C. P. 358; *Barker's Claim,* [1894] 3 Ch. 290; *Crotty* v. *Taylor,* 8 Man. L. R. 188).

After a mortgagee has obtained a decree *nisi* of foreclosure, he cannot sell under a power of sale without the consent of the Court (*Stevens* v. *Theatres, Ltd.,* [1903] 1 Ch. 857).

CHAPTER XIII.

REDEMPTION.

If there is a time fixed for redemption, the right to redeem cannot be exercised before that time: (*Browne* v. *Cole,* 14 Sim. 427), unless such date is more than five years from the date of the mortgage. In that event any person entitled to redeem a mortgage made since July 1st, 1880, can, in effect, redeem by paying the amount due, together with three months' further interest (The Interest Act, R. S. C. 1906), except where the mortgage is given by a joint stock company or other corporation.

Where a mortgagor by conveyance of the legal estate desires to redeem, he must by a rule of practice give six months' notice of his intention to do so or pay six months' interest (*Brown* v. *Lockhart,* 10 Sim. 424; *Smith* v. *Smith,* 1891, 3 Ch. 552; *Archbold* v. *Building & Loan Association,* 15 O. R. 237). As to necessity of a fresh notice on expiry of the six months without payment: see *Re Moss,* 31 C. D. 90.

This rule does not apply to an equitable mortgage by deposit of title deeds (*Fitzgerald's Trustee* v. *Mellersh,* [1892] 1 Ch. 385, and *Spencer Bell* v. *L. S. W. Railway Co.,* 33 W. R. 771). Nor, it seems, would it be applied where the transaction is not a mortgage in the proper sense of the word, but a mere hypothecation giving only a right of realization by judicial process in case of non-payment of the debt (see *Johnson* v. *Shippen,* 2 Lord Raymond 982).

In *Re Pambrun* v. *Short,* 6 W. W. R. 68, it was held by Beck, J., that the rule did not apply to Alberta.

The rule is dealt with in Manitoba by R. S. M., 1902, chapter 115, section 7.

The rule has been held good in Australia: see *Cape* v. *Trustees of Savings Bank,* 14 N. S. W. Eq. 204.

The rule has been held to apply where there was no proviso for redemption, but the security was a conveyance on trust for sale (*Bell* v. *Carter,* 17 B. 11).

An enlargement of time for redemption is not granted as a matter of course (*Re Parbola, Ltd.,* [1909] 2 Ch. 437), but will be granted where the security is ample, and the mortgagor has a reasonable probability of obtaining sufficient money to satisfy the mortgage: *Forrest* v. *Shore,* 32 W. R. 356; *Idington* v. *The Trusts and Guarantee Co.,* [1917] 2 W. W. R. 154; or where there has been a *bona fide* mistake (*Collinson* v. *Jeffery,* [1896] 1 Ch. 644).

It appears that if application be made before the day fixed for payment, the reason need not be a strong one (*Nanny* v. *Edwards,* 4 Rus. 124; *Eyre* v. *Hanson,* 2 B. 478). More than one enlargement of the time can be obtained (see *Edwards* v. *Cunliffe,* 1 Mad. 287).

An enlargement has been obtained even after order for foreclosure absolute (*Ford* v. *Wastell,* 6 H. 229; 2 Ph. 591, and *Thornhill* v. *Manning,* 1 *Sim.* (N.S.) 451).

The granting to a mortgagor of an extension of the time for redemption is a matter for judicial discretion, which will not be interfered with by an Appellate Court, unless the discretion has been exercised upon a wrong principle (*McGregor* v. *Peterson,* 10 W. W. R. 349).

An enlargement of time is more readily granted to a second mortgagee (see *Cameron* v. *Rutledge,* 2 W. L. R. 473).

From that case it appears that the ordinary time allowed for the redemption of mining properties in the Yukon Territory is two months.

Any person entitled to redeem may tender the amount due to the mortgagee, whom it is his duty to find, at any time of the day appointed, when it is light enough to count the money (*Wade's Case,* 5 Coke 114a).

The necessity of tender has been dealt with in *Hammond* v. *Strong,* 6 W. L. R. 694, and 8 W. L. R. 362, and in *Western Trust Co.* v. *Popham,* 2 W. W. R. 297, where it was held that a mortgagee rightfully commencing an action to enforce his mortgage security is entitled to prosecute that action until he has been paid or tendered his money, and is consequently entitled to the costs incident to such prosecution, and cannot be compelled to tax his costs until he gets his money. In order to deprive a mortgagee of his costs there must be paid or tendered to him the amount of principal and interest necessary under the Act to relieve the mortgagor of the consequences of his default, and to place the mortgage in good standing. If the mortgagor

does this, the mortgagee is only entitled to costs to that date.

The general principles of tender are as follows: A person cannot redeem before the time appointed even though he tenders both the principal and the interest to that time (*Brown* v. *Cole,* 14 Sim. 427).

In order to make an effectual tender, the mortgagee must tender the full amount due (including principal, interest and costs) in legal currency: (*Sentance* v. *Porter,* 7 H. 426; *Lewis* v. *Webber,* 1876, W. N. 178), and must produce the actual money to the mortgagee unless the latter waives the production (*Douglas* v. *Patrick,* 3 T. R. 682; *Powney* v. *Blomberg,* 8 Jur. 746; *Lake* v. *Biggar,* 11 U. C. C. P. 170; *Long* v. *Long,* 17 Gr. 251). Tender by cheque may be ineffectual, as where made to an agent without authority to receive (*Blumberg* v. *Life Interests Corporation,* [1897] 1 Ch. 171), but may be good where the creditor does not object (*Polglass* v. *Oliver,* 2 C. & J. 15, and *Jones* v. *Arthur,* 8 Dowl. P. C. 442).

The tender must be unconditional, but it may be made under protest (*Sweny* v. *Smith,* 7 Eq. 324; *Peers* v. *Allen,* 19 Gr. 98; *Greenwood* v. *Sutcliffe,* [1892] 1 Ch. 1).

Where a place for payment is named in the mortgage deed, the tender should be made there; otherwise it should be made to the mortgagee or to his agent.

The tender must be made by the person who has a *prima facie* right to redeem, and not by a stranger.

After a proper tender interest and all subsequent costs stop: *Bishop* v. *Church,* 2 V. Sen. 371; *Garforth* v. *Bradley,* 2 Ves. Sen. 675, and *Knapp* v. *Bower,* 17 Gr. 695.

A mortgagee may, by an improper refusal to accept money properly tendered, lose his right to receive costs, or even be ordered to pay the costs where he renders necessary an action of redemption (*Harmer* v. *Priestly,* 16 B. 569, and *Bank of New South Wales* v. *O'Connor,* 14 A. C. 273), or commences an action of foreclosure (*Smith* v. *Green,* 1 Coll. 555).

A tender may have the effect of stopping the running of interest, even although it has not been such a tender as would afford a defence at law (*Webb* v. *Crosse,* [1912] 1 Ch. 323).

After sale proceedings regularly taken by a mortgagee of land under the Real Property Act, R. S. M. 1902, chapter 148, pursuant to sections 108 to 112 inclusive, whereby the property is sold to a *bona fide* creditor, who makes the first payment called for by the terms of the sale, and binds himself to complete the purchase, it is too late for the mortgagor to apply for redemption, even if the purchaser has made default in strict compliance with his agreement. The fact that in such a case the purchaser has not yet received his transfer from the mortgagee makes no difference: *Saltman* v. *McColl,* 19 Man. L. R. 456.

In that case *National Bank of Australia* v. *United Hand-in-Hand and Band of Hope Co.,* 4 A. C. 391, was distinguished as having been a case of collusion and pretended and fictitious sales.

In an action for redemption under the ordinary procedure, it is essential to make all necessary parties defendants, *e.g.*, the mortgagee or his personal representative or transferee (*Chambers* v. *Goldwin,* 9 V. 269), *cestuis que trust* or their trustees, and sub-mortgagees (*Yates* v. *Hambly,* 2 Atk. 237, and *Hobart* v. *Abbot,* 2 P. Wms. 643), second mortgagees (*Bolton* v. *Salmon,* [1891] 2 Ch. 48).

The best test for ascertaining who should be parties to a foreclosure or redemption action is, who are interested in the taking of the account?

It has been suggested (see *Trust and Agency Co.* v. *Markwell,* 4 S. C. R. Q. 50, and generally, *Greig* v. *Watson,* 7 V. L. R. 79) that there can be no such thing as an action for redemption in mortgages under the Torrens system, inasmuch as an action for redemption seems to postulate the existence of an equity of redemption, and in the case of a Torrens mortgage there can be no equity of redemption, inasmuch as the remedy at law (viz., an action to compel vacation of the mortgage by the mortgagee) is sufficient, and there can be no reason to invoke the principles of equity. (See as to the analogous case of a pledge of goods, the special property wherein, temporarily existent in the pledgee, determines on tender of the money due, *Martindale* v. *Smith,* 1 Q. B. 389, and *Bank of New South Wales* v. *O'Connor,* 14 A. C. 482). The phrase "equity of redemption" is however in constant use in connection with these mortgages, so much so as to have become ratified by usage,

even if there were no such authority for suggesting that not only is the term correct, but also that an ordinary action for redemption may be brought under a Torrens mortgage, as is presented by the judgment of the Privy Council in *National Bank of Australia* v. *United Hand-in-Hand Company,* 4 A. C. 391.

It does not appear to be quite correct to deny the existence of an equity of redemption after a Torrens mortgage has been given.

Lord Parker in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.,* 83 L. J. Ch. 79, carefully distinguishes between the equity to redeem, which arises on failure to exercise a contractual right of redemption, and the equitable estate which, in the case of a mortgage by conveyance of the legal estate, remains from the first in the mortgagor, and is sometimes referred to as an equity of redemption.

" In the case of a mortgagor merely charging a property with payment to the mortgagee of a sum of money, not only does the mortgagee take no interest at law in the property charged, but there is no contract for reconveyance at all. The right to redeem is from the very outset a right in equity only, and it is merely the right to have the property freed from the charge on payment of the moneys charged thereon. If the charge is for payment of a specified sum on a specified day, payment on that day will set the property free; and if the day passes without payment there will still be *an equity* to have the property so freed notwithstanding any

provision in the nature of a penalty, such final provision being a clog on the equity. The difference between transactions by way of equitable charge and transactions by way of conveyance being chiefly important when, for the purpose of determining whether a particular stipulation ought or ought not to be rejected for inconsistency or repugnancy, the nature of the transaction between the parties has to be investigated."

For examples of the use of the term in Australia, see *Coleman* v. *De Lissa,* 6 N. S. W. Eq. 104, and *Nioa* v. *Bell,* 27 V. L. R. 82.

CHAPTER XIV.

Clogs on Redemption.

The rule against fetters or clogs on the redemption is stated by Lord Parker in the case of *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.,* 83 L. J. Ch. 79, at 91, as follows: "The equity which arises on failure to exercise the contractual right cannot be fettered or clogged by any stipulation contained in the mortgage or entered into as part of the mortgage transaction."

In that case the doctrine of the clog upon the redemption, and the standard cases thereon (*Noakes & Co.* v. *Rice,* 71 L. J. Ch. 139, [1902] A. C. 24; *Bradley* v. *Carritt,* 72 L. J. 471, [1903] A. C. 253; *Samuel* v. *Jarrah Timber & Wood Corporation,* [1904] A. C. 323, and *Santley* v. *Wilde,* [1899] 2 Ch. 474), were considered afresh.

The rule was laid down that there is now no rule in equity which precludes a mortgagee, whether the mortgage be made on the occasion of a loan or otherwise, from stipulating for any collateral advantage, provided that such collateral advantage is not either unfair or unconscionable, in the nature of a penalty clogging the equity of redemption, or inconsistent with or repugnant to the contractual and equitable right to redeem.

The facts of the case were that the appellants advanced money to the respondents upon the security of a floating charge over all their property present and future, and agreed that the payment should not be demanded for a period of five years, but the respondents were to be able to repay the debt at an earlier period on giving notice. The

agreement also contained a provision that the borrowers should not sell any sheep skins to any purchasers other than the lenders for a period of five years from the date of the agreement, so long as the lenders were willing to purchase the same at an agreed price. The loan was paid off before the expiration of the five years, but in the opinion of the House of Lords, the option of purchasing the sheep skins was not terminated, but continued for the period of five years.

In the course of his judgment, Lord Parker stated, " I think that the rule depends upon the inconsistency or repugnancy involved in any such provision. If once you come to the conclusion that the parties intended that the property should be redeemed on payment of the moneys secured, any provision which would prevent this must be rejected as inconsistent to and repugnant to the true intention. But, on the other hand, if you once come to the conclusion that this was not the real intention of the parties then the transaction is not one of mortgage at all."

It should be noted that the provision, in order to be a clog, must form part of the mortgage agreement (*Reeves* v. *Lisle,* [1902] A. C. 461).

There may be a provision giving the right to redeem for a reasonable time (see *Teevan* v. *Smith,* 20 C. D. 729; *Biggs* v. *Hoddinott,* [1898] 2 Ch. 307; *Morgan* v. *Jeffreys,* [1910] 1 Ch. 620; and *Fairclough* v. *Swan Brewery Co., Ltd.,* [1912] A. C. 565); but thirty years is too long a time (*Talbot* v. *Braddill,* 1 Vern. 183, 394). A provision which gives the mortgagee the right to extraneous advantages during the period of the mortgage only is

not a clog (*Biggs* v. *Hoddinott, supra*), but even where this extraneous advantage stops with the mortgage, the Courts regard it with suspicion (*James* v. *Kerr,* 40 C. D. 449. See also *Staples* v. *Mackay,* 11 N. Z. L. R. 258.)

The provision is a clog if the effect of its exercise would be to prevent an inchoate right of redemption ever arising (*Samuel* v. *Jarrah Timber & Wood Corporation, Ltd., supra*).

A provision making the total sum due upon a mortgage bond, given to secure instalment payments, enforceable on default in payment of any instalment, is not to be considered a penalty (*Wallingford* v. *Mutual Society,* 5 A. C. 685).

For further cases as to right of limiting or postponing the right to redeem, see *Mellor* v. *Lees,* 2 Atk., 495; *Cowdry* v. *Day,* 1 Giff. 316; *Field* v. *Hopkins,* 44 C. D. 524, and *British South Africa Co.* v. *DeBeers,* [1910] 1 Ch. 354, [1910] 2 Ch. 502, [1912] A. C. 52.

Where a person having an interest in land as heir-at-law of a deceased owner assigns such interest in consideration of an advance of money on the security thereof, and at the time of executing such assignment also executes a separate instrument, giving the person so advancing the money an option to purchase the property, and also gives him a promissory note for the amount advanced, the assignment, although it is absolute and gives a power of attorney to the person advancing the money authorizing him to sell, mortgage or otherwise dispose of the property, will be held an equitable mortgage to secure the advance, and the option will be held a clog on the equity of redemption, and

event of paying off prior mortgages, he would have a right to call for the legal estate, or an equitable mortgagee by deposit of title deeds with or without a memorandum, is entitled to an order for foreclosure (*Cox* v. *Toole,* 20 B. 145).

A Welsh mortgage, *i.e.,* one which gives a mere right to receive the income of the mortgaged property until the debt is satisfied, gives no right to foreclosure (*Lonquet* v. *Scawen,* 1 V. 402, and *Balfe* v. *Lord,* 2 Dr. & War. 480.)

It has been laid down that where there is a mere charge, without either an express or implied agreement for a legal mortgage, foreclosure is not the proper remedy (*Tennant* v. *Trenchard,* 4 Ch. 537).

A judgment debtor whose execution has become a charge on the land is entitled to foreclose (*Jones* v. *Bailey,* 17 B. 582; *Messer* v. *Boyle,* 21 B. 559; see *contra, Wells* v. *Kilpin,* 18 Eq. 299).

A mortgagee who has assigned the mortgage debt, but has expressly reserved the benefit of the security, is entitled to ask for foreclosure (*Morley* v. *Morley,* 25 B. 253).

The transferee of a mortgage may claim foreclosure, subject, however, to payments of interest, or payments on account or in discharge of the capital of the mortgage debt made by the mortgagor to the mortgagee, after, but without knowledge on the part of the mortgagor of the transfer (*Withington* v. *Tate,* 4 Ch. 288; *Haywood* v. *Gregg,* 24 W. R. 157; *Williams* v. *Sorrell,* 4 V. 389; *Re Southampton's Estate,* 50 L. J. Ch. 218; *Dixon* v. *Winch,* [1900] 1 Ch. 736; *Turner* v. *Smith,* [1901] 1 Ch. 213; *Nioa* v. *Bell,* 27 V. L. R. 82).

A judgment for foreclosure may be made in respect of land in another jurisdiction (*Paget* v. *Ede,* 18 Eq. 118; *Toller* v. *Carteret,* 2 Vern. 494; *Colyer* v. *Finch,* 5 H. L. C. 915; *Re Hawthorne,* 23 C. D. 743, and *Deschamps* v. *Miller,* [1908] 1 Ch. 857).

In an order for personal payment, the costs are limited to so much of the costs of the action as would have been incurred if the action had been brought for payment only (*Farrer* v. *Lacy, Hartland and Co.,* 31 C. D. 42), and in such an action the statement of claim should contain an express statement of the covenant for payment (*Law* v. *Philby,* 56 L. T. 230). A second action on the covenant, whether payment is asked for in the first or not, is improper (*Farrer* v. *Lacy, Hartland & Co., supra,* and *Poulett* v. *Hill,* [1893] 1 Ch. 277).

A mortgagee may bring a foreclosure action at any time after default (apart from special contract); and even in cases where he has covenanted not to call in the mortgage moneys for a definite period, it will be implied that such arrangement is conditional upon the punctual payment of interest, and further, where the mortgaged property is leasehold, upon the observance of the covenants contained in the lease (*Seaton* v. *Twyford,* 11 Eq. 591; *Burrowes* v. *Molloy,* 2 J. & L. 52; *Edwards* v. *Martin,* 25 L. J. Ch. 284.)

Where a mortgagee holds collateral securities, the Court directs him first to realize them, and then to proceed to foreclose the mortgage for so much of the debt as his collateral securities may not satisfy (*Dyson* v *Morris,* 1 H. 423).

The final dismissal of an action for redemption of a legal mortgage has been held equivalent to a foreclosure judgment (*Bishop of Winchester* v. *Paine,* 11 V. 199; *Inman* v. *Wearing,* 3 De G. & S. 734). This is not so in the case of an equitable mortgage; nor where the dismissal is for want of prosecution (*Marshall* v. *Shrewsbury,* L. R. 10 Ch. 250).

Where a person is interested only in a part of the mortgage moneys, he cannot obtain an order for foreclosure of a corresponding part of the mortgaged property, but he can make the other persons interested defendants, and sue for foreclosure of the whole property (*Davenport* v. *James,* 7 H. 249; *Palmer* v. *Carlisle,* 1 Sim. & St. 423).

A surety for the mortgagor is not a necessary party to a foreclosure action, unless he has paid off a portion of the mortgage debt (*Gedye* v. *Matson,* 25 B. 310).

The right to enforce a statutory mortgage by foreclosure is resident in the Courts, both in Alberta and in Saskatchewan, by virtue of statutory provision. Thus, it is provided in Alberta that proceedings to enforce payment of moneys secured by mortgage or incumbrance, or to enforce the observance of the covenants, agreements, stipulations or conditions contained in any mortgage or incumbrance, or for the sale of the lands mortgaged or incumbered, or to foreclose the estate, interest or claim of any person in or upon the land mortgaged or incumbered, as also proceedings to redeem or discharge any land from any such

mortgage or incumbrance, may be had and taken in the Supreme Court of the North West Territories, or any Court thereafter constituted exercising within the province the jurisdiction, power and authority, at the date of the passing of the Act, exercised therein by the Supreme Court of the N. W. T., under the practice and procedure of the said Court. (See also sec. 93 of the Saskatchewan Act, whose terms are almost identical with the above section (s. 62 Alta.).

The Courts of Manitoba have no similar express powers of foreclosure. Whether a power of foreclosure of a statutory mortgage is exercisable by them seems very uncertain. It would certainly be unsafe to assume that the Courts of Manitoba will consider that they have any such powers resident in them (see *Barnes* v. *Baird,* 15 Man. L. R. 162; *Williams* v. *Box,* 44 S. C. R. 1; *Smith* v. *National Trust,* 45 S. C. R. 618; and *Re Alarie,* 5 W. W. R. 257).

In *Williams* v. *Box,* 44 S. C. R., it was held that, under the statutory provisions then in the Manitoba Act, the Court could exercise a power of re-opening a statutory foreclosure. Section 126 of the Act then read: " Nothing contained in this Act shall take away or affect the jurisdiction of any competent Court on the ground of fraud, or over contracts for the sale or other disposition of land, or over equitable interests therein, or over mortgages. Nor shall anything contained in this Act affect the right of the mortgagee to foreclose or sell through any competent Court, which right, it is hereby declared, may be exercised in such Court."

In giving his decision Davies, J., rested the right to open a foreclosure largely on the retention of the jurisdiction of the Court over mortgages by the express word of the statute, but expressed the opinion that it was to remove a possible doubt as to whether the mortgagee's right under the statutory mortgage was such an equitable interest in the lands as entitled the mortgagee to ignore the enabling provisions of the Act, providing for foreclosure before the District Registrar, and go into the Court and foreclose his mortgage there; but that the mortgagor certainly had no equitable interest in the land charged which would enable him, under the 126th section, before it was amended, to invoke the equitable jurisdiction of the Court to open up a statutory foreclosure.

Anglin, J., who expressed the opinion of the majority of the Court, thought that an order for foreclosure under section 114, must be subject to the jurisdiction of the Court at least to the same extent as a certificate of title, and that such an order is an instrument with which the Court is empowered by section 52 to deal, that section enabling a Judge to order a District Registrar to issue, cancel or correct certificates and to require the Registrar to deal as he may direct, but he continues: "I entertain no doubt that since the amendment to section 126, conferring upon the Court, or declaring it to possess in respect of mortgages, the jurisdiction which it would have if the Real Property Act had not been passed (probably enacted to remove doubts), the Court has power to open up foreclosure proceedings taken under sections 113

and 114 of the Real Property Act, in the same manner and upon the same grounds as it may open up a foreclosure decreed in an ordinary action."

The Manitoba Act has since this decision been amended by excising from section 126 all words subsequent to " over equitable interests therein," and by removing from section 114 the words declaring the statutory mortgagee's rights and remedies at law and equity to be the same as if the legal estate had been vested in him, including the right to foreclose and sell in any competent Court. Thom, in his work on the Canadian Torrens system, says that owing to this amendment, the position in Manitoba is now back to what it was before 1906, that is, before the amendments to section 108, and section 126, which now have been removed, as outlined in the preceding cases, except that the right of the Court to grant such an order has been adversely passed on by the Courts, has been declared by statute, and the declaration subsequently repealed, so that the lack of jurisdiction of the Courts in such cases is now made quite plain.

It is difficult, however, to see how the removal of clauses which were, according to the dicta of the Judges of the Supreme Court of Canada, inserted to remove doubts, can have the effect of not only reawakening the doubts, but of settling in an adverse sense the doubt to remove which they were expressly inserted. See, however, the decision of the Court of Appeal of Manitoba in *Re Alarie,* 5 W. W. R. 257, where it was held that a simple ordinary final order for foreclosure of a statutory mortgage cannot vest the estate of the mortgagor

in the mortgagee (Perdue, J.A., and Haggart, J.A., adopting the decisions in *Greig* v. *Watson,* 7 V. L. R. 79, and *Long* v. *Town,* 10 N. S. W. Eq. 253, and the dictum by Duff, J., in *Smith* v. *National Trust Co.,* 45 S. C. R. 618, at 644, to formulate a general rule that foreclosure of a statutory mortgage can only be effected by foreclosure under the Act).

In Thom's Torrens System, at page 312, *et seq.,* doubts are expressed as to whether the Courts of Alberta and Saskatchewan have authority to make what are called foreclosure orders vesting the land in the mortgagee, and directing the registrar to cancel the existing certificate of title, and issue a new one in the mortgagee. (See *Colonial Investment and Loan Co.* v. *King,* 5 Terr. L. R. 371; *Cameron* v. *Rutledge,* 2 W. L. R. 473; *Gilroy* v. *Proe,* 8 W. L. R. 777; *C. P. R.* v. *Mang,* 8 W. L. R. 774; *Matthew* v. *McLean,* 11 W. L. R. 630; *Union Bank* v. *McElroy,* 11 W. L. R. 259; *Swan* v. *Wheeler,* 11 W. L. R. 730; *Bernard* v. *Falkner,* 7 W. W. R. 162, for the exercise of this power).

Quite apart from the fact of the futility of objecting to the validity of the foreclosure orders made by the Courts of Alberta and Saskatchewan for years past, and apart from the fact that express statutory authority is conferred upon them by s. 62 of the Alberta Act, and section 93 (1) of the Saskatchewan Act, it might easily be contended that the right to make orders for foreclosure in the case of charges, whether statutory or otherwise, is vested in the Courts. The case of *In re Owen,* [1894] 3 Ch. 220, which is often quoted as an authority for the proposition that a foreclo-

sure order is not the proper remedy for a charge, does not on examination bear out this contention. It is an authority for the proposition that the owner of a charge on land *created by will* is not entitled to foreclosure, but not for the proposition that a charge created by contract and springing from a loan of money will not be entitled to foreclosure. It is true that in *Williams* v. *Box,* 19 Man. L. R. 560, it is said by Perdue, J.A., at page 586, that, before the introduction of the clauses in the Manitoba statute making provision for foreclosure, a Court of Equity could only enforce the charge against the land created by a statutory mortgage by sale of the land. A statement which, though referred to by Idington, J., in the same case on an appeal to the Supreme Court, 44 S. C. R. 1, is not accepted by him in all its fulness.

The proposition is not only contrary to the reasoning in *Re Owen, supra,* but the foundations on which it is based are definitely dissented from in the judgment of Kekewich, J., in *Sadler* v. *Worley,* 63 L. J. Ch. 551, where the holder of debentures creating a floating charge on the property of a company was held entitled to an order for foreclosure.

"What is foreclosure?" says Kekewich, J.: "The answer shall be given in the words of Sir George Jessel, 46 L. J. Ch. 841—*Carter* v. *Wake.* 'The principle on which the Court acts is that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the

Court has interfered to prevent that from having its full effect, and when the ground of interference has gone by the non-payment of the debt, the Court simply removes the stop it has itself put on. That is, in strictness only applicable to a legal mortgage in the full sense of the term. That is to say, it is not in strictness applicable even to an equitable mortgage, such as a puisne mortgage necessarily is, though expressed in legal form; and it is still less applicable to a mortgage by way of charge.'

"Nevertheless the Court has got over the difficulty where the charge has been made by deposit of title deeds, and notwithstanding the absence of an accompanying memorandum with or without an agreement to execute a legal mortgage. In these cases, using again the words of Sir George Jessel in *Carter* v. *Wake,* the Court treats the deposit of title deeds as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage.

"There are cases in which equitable mortgagees of property have been held entitled to foreclosure.

"There are however more pointed instances to be found in Seton on Decrees, 5th ed., vol. 2. . . . One of these (p. 1661) deals with the mortgage of a pension, which was apparently assigned to the mortgagees, but in such form that an irrevocable power of attorney to enable them to receive it was required in event of foreclosure, so that something was necessary to complete the legal title, and the mortgage was in substance equitable.

"Another (p. 1659) deals with consols in Court, and the notes (pages 1652 and following) mention further cases proceeding on the same line. In an earlier note, bottom of page 1583, it is stated, and, I believe, with accuracy, that the remedy of a judgment creditor has been, after some conflict of authority, stated to be foreclosure and not sale. *Is there any good reason why these authorities should not be extended, as apparently they never yet have been, to such a charge as is now under consideration?* If there be any adverse principle of law or rule of practice, the question must be answered in the negative, but otherwise it is well to remember that foreclosure is not likely to be asked, and is still less likely to be asked successfully, except where the security is insufficient, and that in that class of cases the remedy is peculiarly appropriate, and has a value for the mortgagee which can attach to none other. . . .

"*Tennant* v. *Trenchard* was cited, but the judgment in that case seems to me to proceed entirely on the special character of the contract, which made it improper for the trustee to destroy the trust property. I am reluctant to make an order the like of which has never been made before. On the other hand *I ought not to hesitate to apply a principle to facts to which it seems to me to be properly applicable, merely because it has never yet been so applied.*

"There is this further to be considered, even if this debenture does not give, one might easily be framed so as to give, a right of foreclosure as regards the leasehold property comprised in it, and

it would be difficult I think to recognize the right of foreclosure as regards part, and to deny it as regards the other part of the property comprised in the same debentures."

In *Hugill* v. *Wilkinson,* 57 L. J. Ch. 1019, there was a memorandum to the following effect, " received the sum of £150, from my brother John Wilkinson, on the 22nd day of September, 1870, and I hereby give him as security, the whole of my interest I am entitled to out of the property left by my grandfather Joseph Hugill."

In his judgment North, J., says: " Now the right of John Wilkinson against Joseph Wilkinson, and the persons claiming under him, is the right to enforce a charge; that charge may be enforced by way of foreclosure.

This case is quoted by Sterling, J., in his judgment in *Re Owen, supra,* in close juxtaposition to his words quoted *supra.* " When the grounds of that decision, says Sterling, J., are examined they are found to be these.

(1) That an equitable mortgagee has a remedy against the land by way of foreclosure."

Maitland, in his work on Equity, speaking of foreclosure, says, at p. 284: " What can be done by a signed writing, stating an agreement to grant a mortgage, can be done also by a signed writing declaring that the land is charged with the repayment of the loan."

" In the case of a mortgagor merely charging a property with payment to the mortgagee of a sum

of money, not only does the mortgagee take no interest at law in the property charged, but there is no contract for reconveyance at all. The right to redeem is from the very outset a right in equity only, and it is merely the right to have the property freed from the charge on payment of the moneys charged thereupon. If the charge is for payment of a specified sum on a specified day, payment on that day will set the property free; and if the day passes without payment *there will still be an equity* to have the property so freed notwithstanding any provision in the nature of a penalty, such final provision being a clog on the equity. The difference between transactions by way of equitable charge and transactions by way of conveyance with a proviso for reconveyance is chiefly important when, for the purpose of determining whether a particular stipulation ought or ought not to be rejected for inconsistency or repugnancy, the nature of the transaction has to be investigated." (see *Kreglinger* v. *New Patagonia Meat* and *Cold Storage Co.*, 83 L. J. Ch. p. 79, at p. 93).

There seems to be no reason why an order for foreclosure should not operate to foreclose the equitable right of a mortgagor to have his land discharged from the debt secured thereon, after he has failed to make payment on the due date, provided the order is couched in apt phraseology.

Mortgages by deposit and mortgages of copyholds are foreclosed, though the legal interest remains in the mortgagor.

Form of Order for the Foreclosure of Copyholds, Legal Estate not having been Conveyed.

In default of payment of amount certified to be due, order that the defendant do stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the said copyhold hereditaments; and in case of such foreclosure, it is ordered that the defendant do surrender the said copyhold hereditaments to the use of the plaintiff, his heirs and assigns, or as he or they shall direct, and in default thereof this Court doth declare that the plaintiff will be entitled to be admitted to the said copyhold hereditaments. See *Chapman* v. *Andrews,* Pearson, J., 2nd July, 1884. (Seton, 7th ed., 1830).

CHAPTER XVI.

Opening Up Foreclosure.

It has been held that if, after an order of foreclosure absolute, the mortgagee sues the mortgagor on his covenant, the mortgagor acquires a new right to redeem even though he has parted with the equity of redemption (see *Perry* v. *Barker,* 8 V. 527, and 13 V. 198; *Lockhart* v. *Hardy,* 9 B. 349; *Palmer* v. *Hendrie,* 27 B. 349, and 28 B. 341; *Kinnaird* v. *Trollope,* 39 C. D. 636, 57 L. J. Ch. 905; *Platt* v. *Ashbridge,* 12 Gr. 105; *Bank of Toronto* v. *Irwin,* 28 Gr. 397; *Munsen* v. *Hauss,* 22 Gr. 279; *Henry* v. *Chisholm,* 19 N. S. R. 497; *Noble* v. *Campbell,* 21 Man. L. R. 597, 18 W. L. R. 591).

The foreclosure will also be opened, whenever there are sufficient equitable grounds for the same *e.g.,* where it has been obtained by fraud or collusion (*Hill* v. *Handy,* 6 W. W. R. 244; *Loyd* v. *Mansell,* 2 P. Wms. 73; *Gore* v. *Stacpoole,* 1 Dow. 18, H. L.; *Harvey* v. *Tebutt,* 1 J. & W. 197. See also *Jones* v. *Creswicke,* 9 Sim. 304; *Ford* v. *Wastell,* 6 H. 229, 2 Ph. Ch. 591; *Thornhill* v. *Manning,* 1 Sim. 451; *Patch* v. *Ward,* 3 Ch. 203; *Ingham* v. *Sutherland,* 63 L. T. 614. See also *Holford* v. *Yate,* 1 K. & J. 677, where foreclosure appears to have been opened because the mortgagee received rents prior to the final order, and *Burgh* v. *Langton,* 5 Bro. P. C. 213, where a decree of foreclosure was opened after sixteen years, owing to the disproportionate value of the equity of redemption, the mortgagor being in distressed circumstances).

It has been opened as against a purchaser from the mortgagee who contracted to purchase before the order for foreclosure absolute (*Campbell* v. *Holyland,* 7 C. D. 166), but it was held *In re Power and Carton's Contract,* 25 L. R. Ir. 459, that a sale by the mortgagee subsequent to the order for foreclosure to one of the parties to the action did not reopen the foreclosure.

The mortgagor must apply promptly for this relief and will lose his right by acquiescence in the ownership of the mortgagee, especially where there have been any dealings with, or expenditures on the estate (see *Thornhill* v. *Manning,* 1 Sim. 451; *Campbell* v. *Holyland,* 7 C. D. 166; *Fleetwood* v. *Jansen,* 2 Atk. 467, and *Ord* v. *Smith,* Cas. Temp. King 9. See also *Richards* v. *Thompson,* 18 W. L. R. 179).

An enlargement of time for redemption can be obtained even after the order for foreclosure absolute has been passed and entered (see *Ford* v. *Wastell,* 6 H. 229, 2 Ph. 591; *Thornhill* v. *Manning,* 1 Sim. (N. S. 451).

Campbell v. *Holyland, supra,* affords so many criteria for the exercise of the power of foreclosure, that much of the judgment is here quoted *in extenso.*

"Every person taking property by virtue of an order for foreclosure absolute is presumed to have actual knowledge that the Court has a judicial discretion to allow the mortgagor to redeem.

"The terms on which that judicial discretion will be exercised must depend on the circumstances of each case.

"It has been said by the highest authority that it is impossible to say *a priori* what are the terms. They must depend on the circumstances of each case.

"In the first place the mortgagor must come, as it is said, promptly, that is within a reasonable time. He is not to let the mortgagee deal with the estate as if it was his own, if it be a landed estate, being in possession of it and using it, and then without any special reason come and say, "Now I will redeem." He cannot do that, he must come within a reasonable time. Promptness is the great and important feature; see *Thornhill* v. *Manning,* 1 Sim. 451.

"What is a reasonable time? You must have regard to the nature of the property. As has been stated in more than one of the cases, where it is an estate in land in possession, and the mortgagee takes it in possession and deals with the estate and alters the property and so on, the mortgagor must come much more quickly than where it is an estate in reversion, as to which the mortgagee can do nothing except sell it.

"Then you must have regard to the circumstances. Was the mortgagee entitled to redeem but by some accident unable to redeem? Did he expect to get the money from a quarter from which he might reasonably hope to obtain it and was he disappointed at the very last moment? (See *Jones* v. *Creswicke,* 9 Sim. 304). Was it a very large sum, and did he require a considerable time to raise it elsewhere?

"An element for consideration has always been the nature of the property as regards value; for instance, if an estate were worth 50,000*l*, and had been foreclosed for a mortgage debt of 5,000*l*, the man who came to redeem that estate would have a longer time than where the estate was worth 5,100*l*, and he had foreclosed it for 5,000*l*.

"But not only is there money value, but there are other reasons for dealing with rights of property. It may be an old family estate, a chattel, a picture which possesses a special value for the mortgagor, but does not possess the same value for other people, or it may be, as has happened in this instance, that the property, though a reversionary interest in the funds, is of especial value to both the litigants, having regard to some other litigation, not merely a positive money value, but a peculiar value, having regard to the nature of the title and other instances as to which it is impossible to set a money value on it.

"Then it is said you must not interfere against purchasers. As I have already explained there are purchasers and purchasers. If the purchaser buys a freehold estate in possession after the lapse of a considerable time from the foreclosure order absolute, with no notice of any extraneous circumstances which would induce the Court to interfere, I for one would decline to interfere with such a title as that. But if the purchaser bought the estate within twenty-four hours after the foreclosure absolute, and with notice of the fact that it was of much greater value than the amount of the mortgage debt, is it to be supposed that the Court

of Equity would listen to the statement of that purchaser that he was not to be interfered with?"

Foreclosure has been reopened where the mortgagee sold under his power of sale, but only so as to make him account for the surplus proceeds, and not so as to affect a purchaser from him (*Watson* v. *Marston,* 4 De G. M. & G. 230. Cf. *Re Alison,* 11 C. D. 284).

In Queensland it has been held that a mortgagee may sell, and after sale sue the mortgagor on his personal covenant (see *Trust and Agency Co.* v. *Markwell,* B. C. R. 16 Mer., 1874, cited by Power at p. 81).

A mortgagee who had contracted to sell the mortgaged property was allowed after foreclosure, on rescinding the contract and offering to re-convey, to prove for his principal and interest in the administration of the estate of the mortgagor, but was not allowed to prove for the costs of the foreclosure suit (*Haynes* v. *Haynes,* 3 Jur. N. S. 504).

It has been held in *Miller* v. *McCuaig,* 6 Man. L. R. 539, that a mortgagee may purchase at a tax sale, and that the effect of his so doing is equivalent to a final order for foreclosure.

If after having bought at a tax sale, a mortgagee sues upon the covenant, he must be regarded as having elected to treat the mortgage as still redeemable. The mortgagor should in that case be placed in the same position as if the mortgagee was suing after having obtained a final order of foreclosure. (S. C., see also judgment of Spragge, V.C., in *Kelly* v. *Macklem,* 14 Gr. 29).

A mortgagee should still be regarded as being able to reconvey even though he has sold the building on the land which was the whole value of the subject matter of the mortgage. That is simply a question of account (*Munsen* v. *Hauss,* 22 Gr. 279).

Where a mortgagee purchases the mortgaged lands at a tax sale and receives a tax deed therefor, he is entitled to the surplus moneys realized by the municipality from such sale in excess of the taxes and costs (*Re Grant,* 7 M. R. 468).

It has been held in *Colonial Investment Co.* v. *King,* 5 Terr. L. R. 381, by McGuire, C.J., that after a vesting order obtained in a foreclosure action, the mortgagee could no longer sue on the covenant for payment contained in the mortgage, the right to sue having merged in the judgment or order, owing to absence of any indication of a contrary intention.

McGuire, C.J., said: "It was, therefore, by their own deliberate acts that a judgment was obtained vesting the title in them, instead of having the property sold. The result was the same as if the mortgagor had given them a transfer. Now had he given them a conveyance they could not have sued him on his covenant 'in the absence of evidence to show a contrary intent or result:' *North of Scotland Mortgage Co.* v. *Udell,* 46 U. C. Q. B. 511. On the same page the learned Chief Justice says: 'I am strongly of opinion that the burden is thrown upon the plaintiff to satisfy a jury that a different effect was intended to be given to the transaction.' In the

present case there is no evidence to show that the plaintiffs intended to reserve the right to sue on the covenant. There are some circumstances tending to establish the opposite, such as their intentionally electing to take a vesting order rather than an order for sale, and the fact that they waited over sixteen months after getting their vesting order before beginning the present action. In the case just referred to, the plaintiffs had taken a deed in fee, but the cases relied upon by Hagarty, C.J., show that a conveyance of the equity of redemption has the same effect. It seems to me that, if anything, the conveyance by a mortgagor in the Territories to the mortgagee of his legal estate is when unexplained even stronger evidence that the mortgagee did not intend to reserve a right to sue on the covenant. To use again the language of the judgment of Hagarty, C.J., in such a case, 'the natural presumption must be that the charge is merged in the complete ownership of the inheritance.' Now there was, it is true, no conveyance executed by King to the mortgagees, but there is what is its equivalent—a conveyance by order of the Court, and whatever reasons apply in the one case seem to me equally applicable in the other, for presuming a merger of the charge in the title thus vested in the mortgagees. It may often be a very distinct advantage to a mortgagee to get the property itself in preference to receiving his money, especially in the West here where land values are rapidly increasing. At any rate, where he chooses to take the title without reserving his right to sue on the covenant, it seems only reasonable that the presumption should be as laid down in the case

just cited. I think that a jury would reasonably find in the present case that the mortgagees did not intend to reserve a right to sue upon the covenant, and that is the conclusion I have arrived at on the facts. As to the merger of a claim in a judgment, see *Toronto Dental Mfg. Co.* v. *McLaren,* 14 P. R. 89. The head note of a decision taken from a digest of Australian cases under the Torrens Land System (*Campbell* v. *Bank of N. S. Wales,* 16 N. S. W. L. R. 285; 11 A. C. 192), was cited on the argument by counsel for the defendant King: 'Where the formalities provided by the Real Property Act for the foreclosure of a mortgage under the Act had been complied with and there has been no fraud, the Court has no power to reopen the foreclosure.' Unfortunately I have been unable to see the reasons given in the judgments in the case, and one is left to conjecture what were the grounds of the decision.

"There were other points which I may refer to; for example, the plaintiffs' offer to reopen the foreclosure. I am not convinced that the judgment in the present case was a 'foreclosure' in the sense in which the word is used where the law as to reopening a foreclosure is dealt with. It seems to me it is a judgment, and the evil of allowing the plaintiffs to reopen it would be the same as allowing a plaintiff to get a new trial in any other case in which he has proceeded to judgment and has got all he asked for. See case last cited from 14 P. R."

The position as to foreclosure in Australia, prior to the decision in *Re Fink, infra,* was as follows: "The statutory foreclosure cannot be reopened by

the mortgagor as can be done under the general law, and in accordance with the principles of the system the mortgagor would either have to show, as against the mortgagee, irregularity or fraud (*Campbell* v. *Bank of New South Wales,* 1886, 16 N. S. W. Eq. 285; 11 A. C. 192; *In re Premier Permanent Association,* 25 V. L. R. 77; *Matton* v. *Lipscomb,* 1895, 16 N. S. W. Eq. 145), or that the mortgagee was treating the mortgage as still existing, whilst, as against a purchaser from the mortgagee, the mortgagor would appear to have no remedy at all (*Gibbs* v. *Messer,* [1891] A. C. 248, at 255). But it is conceived that the mortgagor would still have his personal remedy against the mortgagee as for an improper exercise of his powers under the mortgage" (Hogg, p. 960).

In *Re The Premier Permanent Building Land and Investment Association, Ex parte Lyell,* 25 V. L. R. 77, it was held that notwithstanding the words of section 130 of the Transfer of Land Act, 1890, as to the mortgagee after registration of a foreclosure order being deemed a transferee and becoming a proprietor, foreclosure under that Act may be re-opened by the mortgagee bringing an action on the covenant contained in the mortgage deed.

Madden, C.J., said: "This statute is a conveyancing Act, and was not intended to over-ride the ordinary rules of equity applying to land, merely because it is brought under this particular system of conveyancing."

Hodges, J., said: "It seems to me that when a mortgagee sues on his covenant after foreclosure

he thereby reopens the foreclosure, and although the Act takes away and bars the right of the mortgagor, yet probably this action of the mortgagee gives a new right to the mortgagor which had been taken away by the Act. It is, so to speak, not his old right to redeem, but probably it gives him a new right by reason of the step taken by the mortgagee."

Robertson v. *Fink* (1906), V. L. R., p. 554, expressly follows this case, Chomley, J., saying: "I think the obligation arising from the covenant to pay contained in the mortgage continues, notwithstanding the foreclosure," and again: "If the defendant has a right of redemption by reason of the bringing of this action, I think his original right has revived, not that a new right has been created."

Upon appeal the Court held (4 C. L. R. 864), that on foreclosure under sections 129 and 130 of the Transfer of Land Act, 1890, the title of the mortgagee, when, pursuant to section 130, he is registered as proprietor of the mortgaged land, is, in the absence of fraud, absolute and unimpeachable, and by reason of the provision in section 130 that the mortgagee shall be deemed a transferee of the mortgaged land, and of the other provisions of the Act as defining the obligations incurred by a transferee of mortgaged land, with respect to the mortgage debt, the mortgage debt is extinguished, and therefore *no action will lie subsequently by the mortgagee upon the covenant in the mortgage* to repay the mortgage debt (Griffith, C.J., and Warton and O'Connor, JJ., Higgins, J., dissenting as to extinguishment of the mortgage debt).

The Court further said: "We are of opinion that when the statute says in express terms that a person with respect to whom certain facts can be predicated shall be deemed to be the transferee of land, the meaning is that he shall be the transferee to the same intent and with the same consequences as if he had become a transferee by registration of an instrument called an instrument of transfer, and executed by the person whose interest is transferred."

Higgins, J., in a dissenting judgment said: "It is obvious to my mind that no such implication of a promise to indemnify can be deduced from an order of the Court which merely gives effect to the rights of the parties, as from a transfer *inter partes,* which rests on agreement. The mortgagor does not on foreclosure transfer the land to the mortgagee. It is the registration order which transfers it."

Higgins, J., also called attention to the fact that one curious result of holding that the foreclosure of a mortgage involves the release of the debt is that a mortgagee who has foreclosed one mortgage must discharge unconditionally all the securities for the same debt.

As to the operation of the entry of a foreclosure order to discharge a surety for the payment of the mortgage debt, see *Matton* v. *Lipscomb,* 16 N. S. W. L. R. Eq. 142.

In *Noble* v. *Campbell,* 21 Man. L. R. 597; 18 W. L. R. 591, Robson, J., did not follow *Fink* v. *Robinson,* preferring the dissenting opinion of Higgins, J.: "I take the solution of the matter in

question here to be, that as the result of *Williams* v. *Box,* 44 S. C. R. 1, mortgage transactions under the Act as it then stood, are to be dealt with in accordance with the principles of equity jurisprudence, and that foreclosure under the statute did not, as between the parties, any more than a decree absolute would have done, prevent Courts of equity from regarding the intent rather than the form, and applying the principle stated by Jessel, M.R., in *Campbell* v. *Holyland,* 7 C. D. 166. One result is that, as shown by the words of Van Koughnet, C., quoted from *Platt* v. *Ashbridge,* 12 Gr. 106, the mortgagee notwithstanding the foreclosure, may recover on the covenant unless he has parted with the property. In view of the implied repeal or modification of the words in section 114, "free from all right and equity of redemption on the part of the owner, mortgagor, etc.," there would seem to be no difficulty in applying these principles. Section 114 also declares that upon entry of a foreclosure order under the Act the mortgagee shall be deemed a transferee of the land and become the owner thereof. The principles of equity referred to may equally be applied in such circumstances as in the case of foreclosure by decree. Were a transfer absolute in form made in the first place by the mortgagor as security, although the mortgagee would be a transferee, and under the Act owner of the land, the transaction would still be treated as if it were a mortgage. See *Blunt* v. *Marsh,* 1 Terr. L. R. 126. The fact that there is now a certificate of title for the land in the name of the mortgagee indicates merely a change of form of the

transaction, and does not prevent the mortgagee from suing, any more than a decree absolute in the first place or a conveyance absolute in form, than in fact a security would have done.

The setting aside of a final decree of foreclosure is not necessary in an action for redemption subsequently brought; see *Chatfield* v. *Cunningham,* 23 O. R. 153, at p. 161. I am aware that in *Fink* v. *Robertson,* 4 C. L. R. 864, it was held that after foreclosure under the Act there in force, a mortgagee could not recover on the covenants. It does not appear, however, that in the legislation under consideration in that case, the principles of equity in respect of mortgages were preserved unaffected as under the Act in question here. Aside from that the dissenting opinion of Higgins, J., seems more in accord with the view expressed in *Williams* v. *Box,* than does the majority."

It must be remembered, as pointed out by Thom, at p. 316, that the words of the Manitoba Act, upon which *Williams* v. *Box* largely turned, have, since the circumstances of *Noble* v. *Campbell* arose, been repealed. "In view of the more recent decision in *Smith* v. *National Trust Co.,* 45 S. C. R. 618, it seems unlikely that the Supreme Court," says Thom, "would not extend the principle of *Williams* v. *Box* to cover the Manitoba Act as amended, and therefore in all probability the law as stated in *Colonial Investment Co.* v. *King* and *Fink* v. *Robertson,* correctly states the present law in regard to enforcement of the covenant after foreclosure in all Canadian jurisdictions, namely, that such

covenant is extinguished upon the registration of a foreclosure order."

It does not, however, seem that this deduction of Mr. Thom is a necessary deduction, and it has not been fully adopted in *Bernard* v. *Faulkner,* 7 W. W. R. 162, where Walsh, J., decided that upon an application for a final order of foreclosure and vesting order after an abortive sale, there might be included in the order a paragraph reserving the rights of the mortgagee upon the covenant for payment and directing that none of the covenants implied under section 52 of the Land Titles Act, Alberta, should apply thereto, but that, should the mortgagee, after an order for foreclosure containing such a reservation, attempt to enforce his personal remedy on the covenant for payment, the foreclosure must be opened up and the mortgagee be prepared to transfer the land upon being paid in full.

It would also appear that the view adopted in *Fink* v. *Robertson* has not been adopted by the legislature in Alberta, which by an amendment to section 62 of the Land Titles Act provides that no proceedings under that section for the enforcement of the covenant for payment shall be commenced, or if commenced shall be continued until the remedies provided by the next following section (that is attempted sale and foreclosure) are exhausted.

[See *Orser* v. *Colonial Investment Co.,* 1917, 3 W. W. R. 513, for negation of implied covenant and note at end of book on Opening Foreclosure.]

CHAPTER XVII.

Right to a Receiver.

The general principles of appointing a receiver by way of equitable execution have been lately considered in *Morgan* v. *Hart,* 83 L. J. K. B. 782, where it was held that the Court has no jurisdiction to appoint a receiver by way of so-called equitable execution in aid of a judgment at law, except in cases where, by reason of the nature of the property, execution cannot be levied in the ordinary way, and in which the Court of Chancery would before the Judicature Act of 1873, have had jurisdiction to make the order; see *Harris* v. *Beauchamp,* 63 L. J. Q. B. 480; 1894, 1 Q. B. 801. That was a case where, owing to chattels being so mixed up in a furniture repository as to be indistinguishable from the chattels of other persons, the creditor was unable to indicate to the sheriff the chattels he wished to have seized, and so was unable to exercise the common law right.

In *Imperial Bank of Canada* v. *Twyford,* 1 W. L. R. 157, a receiver by way of equitable execution was appointed of rents of property owned by defendant subject to a mortgage (see also *Kirk* v. *Burgess,* 15 O. R. 608).

A mortgagee by way of equitable deposit has a right to a receiver upon an interlocutory application, provided that he makes out a *prima facie*

case that he has an equitable mortgage, that he shows that at least his interest is in arrear, and that his action is to enforce his security (*Union Bank of Canada* v. *Engen,* [1917] 1 W. W. R. 271, and [1917], 2 W. W. R. 395).

In the case just cited, it appeared that subsequent to the creation of the equitable mortgage by deposit of the duplicate certificate, the mortgagor subsequently executed in the favour of the equitable mortgagee a statutory mortgage on a portion of the mortgaged lands to better secure a portion of his indebtedness.

It was objected that the appointment of a receiver operated as a taking possession, and that a mortgagee was not entitled to take possession of the mortgaged property, unless he proceeded as set up in sub-section 2 of section 93 of the Land Titles Act, Saskatchewan.

" Section 93 of the Land Titles Act provides two modes of foreclosure, or otherwise realizing from mortgages," says Newlands, J. " Sub-section 1 provides that the mortgage may be foreclosed or the land sold under the practice and procedure under the Supreme Court, and the following sub-sections provide for the foreclosure or sale by proceedings before the Registrar."

" The two methods of procedure are entirely distinct, and sub-section 2 has no application when the mortgagee elects to proceed under the first subsection under the practice and procedure of the Supreme Court.

"It would appear that in this case the receiver was asked for, as much for the preservation of the mortgaged property as for any other reason.

"The mortgagor having transferred the land to his wife, and the transfer having been registered, the mortgagor was in fact in insolvent circumstances."

A right to a receiver appointed by the Court is not necessarily lost even where a statute provides a statutory method for the appointment of a receiver. Thus in *Tillet* v. *Nixon,* 53 L. J. Ch. 199, North, J., says: "I have no doubt that the mortgagee might appoint a receiver under the Conveyancing Act of 1881, without coming to the Court, but when an action for foreclosure is pending, and the parties are at arm's length, it is much more desirable that the receiver should be appointed by the Court."

Where a business is carried on on mortgaged property, the receiver will not be appointed to manage the business unless the business is included in the security (*Whitley* v. *Challis,* [1892] 1 Ch. 64), or it is necessary to protect the mortgaged property (*Campbell* v. *Lloyds Bank,* [1891] 1 Chy. 136), or it is necessary to protect the property by selling the business with it as a going concern (*Makins* v. *Percy Ibotson & Sons,* [1891] 1 Ch. 133).

A mortgagee who has taken possession may under certain circumstances have a receiver appointed (*Tillet* v. *Nixon,* 25 Ch. D. 238; *Mason* v. *Westoby,* 32 C. D. 206; *In re Prytherch,* 42 C. D. 590; *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.,* [1895] 1 Ch. 629).

Where his interest is in arrear, an equitable mortgagee has a *prima facie* right to a receiver (*Strong* v. *Carlyle Press,* [1893] 1 Ch. 268).

Where a prior mortgagee declines to take possession a receiver will be appointed at the instance of a puisne mortgagee, but not where the prior mortgagee is in possession, unless the prior mortgagee is paid off, or refuses to accept what is due to him (*Cadogan* v. *Lyric Theatre,* [1894] 3 Ch. 338; *Hiles* v. *Moore,* 15 B. 175; *Quarrell* v. *Beckford,* 13 V. 377; *Codrington* v. *Parker,* 16 V. 469, and *Berney* v. *Sewell,* 1 J. & W. 647).

CHAPTER XVIII.

ACCOUNTS.

The right of a mortgagor to redeem is of the same nature, whether it be exercised under an order for redemption or an order for foreclosure, except that in the former case the mortgagee is allowed in the account all arrears of interest: *Re Lloyd,* [1903] 1 Ch. 385, but in the latter case only six years.

The order will direct an account of what is due for principal and interest and costs, the general rule being that the mortgagee will be allowed all costs incurred in perfecting, maintaining, and realising his security, and, if he takes possession, all charges and expenses reasonably incurred in collecting the income and managing the property.

Where such expenditure is claimed the order will direct an account of moneys expended on substantial repairs and lasting improvements, but not otherwise, but any sums properly included under the terms of the contract may be claimed by the mortgagee as just allowances, without any direction in the judgment for that purpose (*Blackford* v. *Davis,* 4 Ch. 304), and sums expended in necessary repairs will also be included under that heading (*Tipton Green Co.* v. *Tipton Moat Co.,* 7 C. D. 192; *Sandon* v. *Hooper,* 6 B. 246; *Quarrell* v. *Beckford,* 14 V. 177; *Webb* v. *Rorke,* 2 Sc. & Lef. 676; *Pelley* v. *Bascombe,* 11 W. R. 706; 13 W. R. 306; *Scholefield* v. *Lockwood,* 11 W. R. 555; *Eyre* v.

Hughes, 2 C. D. 148; *Shepard* v. *Jones,* 21 C. D. 469; *White* v. *City of London Brewery Co.,* 42 C. D. 237); but such costs do not constitute a debt of the mortgagor in respect of which an action can be brought, not being founded on an implied contract to pay them (*Ex parte Fewings,* 25 C. D. 338, at 352).

The mortgagee will be allowed:—

(1) The costs of proceedings between mortgagee and mortgagor (*National Provincial Bank of England and Games,* 31 C. D. 582); but costs incurred in negotiating for the loan cannot be added to the mortgage debt (*Wales* v. *Carr,* [1902] 1 Ch. 860).

(2) Moneys paid by the mortgagee to preserve the property, for example, rent and premiums on life policies (*Lacon* v. *Mertins,* 3 Atk. 4).

(3) The salary of a person employed in managing mortgaged property, or the commission of an agent to collect the rents, where the mortgagee would employ one, if the owner (*Godfrey* v. *Watson,* 3 Atk. 517; *Eyre* v. *Hughes,* 2 C. D. 148; *Freehold Loan Co.* v. *McLean,* 9 Man. L. R. 15; see also *Powell* v. *Broadhurst,* [1901] 2 Ch. 160; *Shepard* v. *Jones,* 21 C. D. 469; *Tipton Green Colliery Co.* v. *Tipton Moat Colliery Co.,* 7 C. D. 192.

(4) The costs of litigation properly undertaken in respect of the mortgage debt or the mortgage security, *e.g.,* those of defending the mortgagor's title (*Godfrey* v. *Watson,* 3 Atk. 517), or of obtaining possession of the mortgaged property (*Owen* v. *Crouch,* 5 W. R. 545; *Horlock* v. *Smith,* 1 Coll. 298), or of an action

against the surety (*Sachs* v. *Ashby & Co.*, 88 L. T. R. 393), or incident to the dishonour of a bill or note (*Aberdeen* v. *Chitty*, 3 Y. & C. 379), or of administration to a deceased mortgagor (*Ramsden* v. *Langley*, 2 Vern. 536).

(5) The mortgagee's costs of the redemption or foreclosure action.

(6) All insurance premiums and salvage payments when he is entitled under the mortgage to insure the premises against fire at the mortgagor's expense (*Dobson* v. *Land*, 8 Ha. 216; *Bellamy* v. *Brickenden*, 2 J. & H. 137; but for allowance without contractual right: see *Scholefield* v. *Lockwood*, 11 W. R. 555).

(7) The mortgagee may also charge interest on outlays of a permanent nature, at the rate reserved by the mortgage (*Woolley* v. *Drage*, 2 Anst. 551; but see *Wrigley* v. *Gill*, [1905] 1 Ch. 165); but not on what is expended by him upon ordinary repairs, when he is in receipt of the rents and profits (but see *Eyre* v. *Hughes*, *supra*).

The rate of interest allowed upon redemption is not affected by the fact that the covenant to pay has been merged in a judgment (*Economic Life Assurance Society* v. *Usborne*, [1902] A. C. 147).

(8) The costs of an abortive sale (*Sutton* v. *Rawlings*, 3 Ex. 407; see *Cameron* v. *McIlroy*, 1 Man. L. R. 242).

A receipt clause is *prima facie* evidence of the amount advanced, but it is not conclusive (*Mainland* v. *Upjohn*, 41 C. D. 126).

The actual amount due on a mortgage to secure a current account, or for further advances, may be

proved by evidence outside the mortgage (*Melland* v. *Gray,* 2 Y. & C. Ch. 199).

Where a mortgagee assigns his mortgage without the concurrence of mortgagor, the costs of the transfer cannot be added to the mortgage debt: (*In re Radcliffe,* 22 B. 201).

A solicitor-mortgagee is not allowed to charge profit costs for legal work done by himself, and neither an auctioneer (*Furber* v. *Cobb,* 18 Q. B. D. 494), nor broker-mortgagee (*Arnold* v. *Garner,* 2 Ph. 231), can charge a commission for selling, but the partner of a mortgagee may be entitled to make a charge (*Re Doody,* [1893] 1 Ch. 129).

It was held in *Phillips* v. *Pratt,* 12 Man. L. R. 143, that where, in the negotiations for a loan to be secured by a mortgage, the mortgagee stipulates for a bonus, or a special commission or other charge in consideration of advancing the money, in addition to the interest, he may retain it, and if he deducts the amount at the time from the loan, and only advances the balance, or in case the amount is otherwise paid and settled, but otherwise such bonus or special advantage cannot be recovered or allowed in equity. This head note is perhaps scarcely accurate, and if accurate, seems to be in conflict with *Bucknell* v. *Vickery,* 64 L. T. R. 701 P. C., where Lord Hobhouse says if the contract between the parties entitles the mortgagee to a commission he can claim it, either in taking the amount off what is first due on his mortgage, or under the heading "Just Allowances." (See also *Mainland* v. *Upjohn,* 41 C. D. 126; *Potter* v.

Edwards, 26 L. J. Ch. 468; *Biggs* v. *Hoddinott,* [1898] 2 Ch. 367. See also *The Benwell Tower,* 72 L. T. R. 664, at 670. See *contra, Broad* v. *Selfe,* 11 W. R. 1036, and *James* v. *Kerr,* 4 C. D. 449, at 459).

It is clear that an arrangement to pay a greater sum in the future in consideration of a present advance is valid (*Wallingford* v. *Mutual Society,* 5 A. C. 685, at 702).

A mortgagee has no right as against the mortgagor to improve the mortgagor out of his property (*Sandon* v. *Hooper,* 6 B. 246), and if he lays out a very large sum, that is in itself a thing which he has no right to do. The mortgagor must not be prevented from redeeming by the mortgagee when in possession throwing a greater burden upon him (*Shepard* v. *Jones,* 21 C. D. 469). A mortgagee may be entitled to the costs of extensive improvements where there is no fraud or oppression, and the money is reasonably expended in productive improvements which are lasting, necessary and proper (*Henderson* v. *Astwood,* [1894] A. C. 150; *Manitoba Lumber Co. Limited* v. *Emerson,* 2 W. W. R. 419).

A mortgagee in possession who has made expenditure in the way of permanent improvements, not falling within such terms as just allowances or necessary repairs, must allege and prove to the Court the substantial facts upon which he founds a claim therefor, before any special reference will be made allowing the same (*Manitoba Lumber Co.* v. *Emerson,* 6 W. W. R. 1450).

A mortgagee must not proceed with permanent improvements in the face of a suit for redemption. S.C.

In *Canadian Mortgage Investment Co.* v. *Baird,* 10 W. W. R. 1195, Beck, J., had to deal with the right of the mortgagee to insurance premiums, fees paid for tax certificates, commission on collection of arrears, charges by solicitors or agents, and the mortgagee's and solicitor's charges for letters. As to the first item he held them recoverable because of the usual provision under the mortgage authorizing their payment, and even without that as a payment made to protect the security. The other items he considered as coming under the title of extraordinary costs, charges and expenses, which are somewhat different from and beyond the costs taxable, which are not allowed as a matter of course, but require a special case to be made for them, and can only be allowed if there is in the judgment a special direction making them a subject of action. "Generally speaking," says Beck, J., "items of expense, reasonable in amount and reasonably incurred in preserving the security or in efforts to realize upon it, are allowed without any special covenant in the mortgage, and generally speaking a covenant will not magnify the right. The fact that the mortgagee has, or has not, gone into possession is a material circumstance. The mortgagee is not entitled to make any personal profit from his own services." With respect to the particular items, he held that the mortgagees were entitled to the fees paid for searches to ascertain whether taxes were in arrear or not, but that

this should be done by the mortgagees themselves, and not put into the hands of solicitors. As to the letters by the solicitors demanding payment, he held that they were not collectable except as charges included in the taxable costs of proceedings pending or subsequently commenced. As to the commissions and collections, he held that in the absence of the mortgagee having taken possession, or of a receiver having been appointed, and in the absence of an arrangement made after default, they were not allowable, whether made in consequence of legal proceedings or not, except in extremely special cases.

In *Cockshutt Plow Co.* v. *Gray,* 12 W. L. R. 435, the mortgagees in a foreclosure action were compelled to give an account of moneys received, or which ought to have been received by them under a trust agreement with the mortgagor. The Judge distinguished the case of *Sanguinetti* v. *Stuckey's Banking Co.* [1896] 1 Ch. 502), which decided that any special circumstance or fact affecting the amount due from the mortgagor to the mortgagee in a foreclosure action—such as a valuation of the security in bankruptcy—should be pleaded or brought to the attention of the Court before the usual foreclosure judgment is made, in order that a direction may be given to the chief clerk to have regard, in taking the account, to such special circumstance or fact, and that if this is not done at the trial, no such question should be subsequently raised on taking action.

Where the mortgagor is indebted to the mortgagee otherwise than on the mortgage, the mort-

gagee cannot, as against other incumbrancers appropriate sums received under the mortgage to such other debts (*Young* v. *English,* 7 B. 10).

In the *Bank of Hamilton* v. *Leslie* (No. 2), 7 Terr. Law Reports 303, it was held that while the general rule in suits for foreclosure or redemption is to allow the mortgagee all his costs even where he does not succeed in establishing his right to the full amount claimed, yet where the conduct of the mortgagee has been oppressive and unconscientious, the Court has the discretion to deprive him of costs and to award costs to the mortgagor. The case of *Cottrell* v. *Finney,* 9 Ch. 541, was expressly approved, where James, L.J., says: "The mortgagee is entitled to his security, as security for principal, interest and costs—that is the cost of a redemption suit or foreclosure suit—unless the mortgagee has refused to take when offered the full sum due him, in which case he loses subsequent interest and all costs, and is made liable to pay costs, or unless the Court says that the conduct of the mortgagee has been oppressive, and that he has been availing himself of his power to extort something which he ought not to have, or doing something which this Court regards as unconscientious."

The carrying on or resistance of proceedings by the mortgagee unreasonably, leaves the question of costs in the discretion of the Judge (*Charles* v. *Jones,* 33 C. D. 80).

In *Hammond* v. *Strong,* 6 W. L. R. 694, it was held (following *Kinnaird* v. *Trollope,* 42 C. D. 615; *Hodges* v. *Croydon Canal Co.,* 3 B. 86, and *In re*

Watts, 22 C. D. 5), that the mere fact of the mortgagee claiming more than he is entitled to is not sufficient to deprive him of his costs.

In *Union Trust* v. *Duplat,* 7 W. L. R. 459, the costs of serving prior incumbrancers with a copy of a foreclosure summons were directed to be borne by the plaintiffs personally, and not to be charged against the property foreclosed.

In *Confederation Life Assn.* v. *Leier,* 8 W. L. R. 343, the costs of correspondence between the mortgagees and their solicitors and the mortgagor and their own agents were allowed.

In *Matthew* v. *McLean,* 11 W. L. R. 630, the costs of an application for an order varying an order *nisi* for foreclosure, and adding thereto the amount of taxes levied against the land since the order *nisi,* and paid by the mortgagee, were directed to be borne by the mortgagee, inasmuch as the mortgagee had not been compelled to make this payment to protect his security.

A mortgagee entering into possession as owner, and not as mortgagee, is not, upon opening of a foreclosure, bound to account as strictly as an ordinary mortgagee in possession. (*Semble*) (*Williams* v. *Box,* 5 W. W. R. 912; see also *Bird* v. *Gaudy,* 2 Eq. Cas. Abr. 251 (4); *Parkinson* v. *Hanbury,* 2 H. L. 1).

Where a mortgagee actually enters into lawful possession of land under the terms of his mortgage, he becomes entitled to any crops growing on the land as against a mortgagee of the crops under a chattel mortgage executed after his mortgage and before possession taken, but if the

crops are cut at the time of possession taken, the holder of the chattel mortgage will have priority (*Harrison* v. *Carbery Elevator Co.*, 7 W. L. R. 535, following *Laing* v. *Ontario Loan & Savings Co.*, 40 U. C. Q. B. 114, and *Re Phillips*, 16 C. D. 104).

A mortgagee may be even compelled to pay costs, *e.g.*, where he has denied the right of the plaintiff to redeem (*Hall* v. *Heward*, 32 C. D. 430), or claimed that the mortgage was an absolute conveyance (*Baker* v. *Wind*, 1 Ves. Sen. 160; *LeTarge* v. *De Tuyll*, 3 Gr. 369, and *Livingston* v. *Wood*, 27 Gr. 515), or refused accounts (*Powell* v. *Trotter*, 1 Dr. & Sm. 388); or being overpaid, has claimed a balance due to him (*Heath* v. *Chinn*, 98 L. T. R. 855); see also *Bryson* v. *Huntington*, 25 Gr. 265; *Miller* v. *Brown*, 3 O. R. 210, and *Graham* v. *Ross*, 6 O. R. 154).

A mortgagee is not bound to accept payment of his money by driblets (*Nelson* v. *Booth*, 3 De G. & J. 119, and *Wrigley* v. *Gill*, [1905] 1 Ch. 241), and, therefore, a direction is not usually given to take the account as against a mortgagee in possession with rests. After a mortgage has been satisfied the mortgagee must account with rests (*Wilson* v. *Metcalfe*, 1 Russ. 530, and *Ashworth* v. *Lord*, 36 C. D. 545; see also *Lloyd* v. *Jones*, 12 Sim. 491).

A mortgagee in possession is bound to account, not only for what he has received, but also for what, but for his wilful default, he might have received: *Sherwin* v. *Shakespear*, 5 De G. M. & G. 517; *Parkinson* v. *Hanbury*, 2 H. L. 1, and that

though no charge of wilful default has been made in the pleadings (*Mayer* v. *Murray,* 8 C. D. 424).

On this footing a mortgagee in possession is responsible for not letting the property and for not getting full rents (*Hughes* v. *Williams,* 12 V. 493; *Brandon* v. *Brandon,* 10 W. R. 287; *Noyes* v. *Pollock,* 32 C. D. 53, and *White* v. *City of London Brewery Co.,* 42 C. D. 237). He is not bound to distrain (*Cocks* v. *Gray,* 1 Giff. 77).

A mortgagee is bound to act as a provident owner, and so is responsible for loss occasioned by his improper conduct, *e.g.,* by a failure to observe the covenants contained in the lease, where leaseholds are mortgaged (*Perry* v. *Walker,* 24 L. J. Ch. 319).

While not called upon to make large expenditures, a mortgagee in possession must make repairs where they are necessary in order to derive rental from the property, where the amount is small compared with the rental which can thereby be derived; but he is not called upon to rebuild, or lay out large sums beyond the rent (*Williams* v. *Box,* 4 W. W. R. 244; *Richards* v. *Morgan,* 4 Y. & C. 570; *Sherwin* v. *Shakespear,* 5 De G. M. & G. 517; *Kensington* v. *Bouverie,* 7 De G. M. & G. 134, and *Moore* v. *Painter,* 6 Jur. 903; *Marshall* v. *Cave,* 3 L. J. Ch. 57).

An action for an account of surplus proceeds after a sale by the mortgagee is not within the rule as to costs of redemption actions, and a mortgagee may have to pay the costs (*Williams* v. *Jones,* 55 Sol. Jo. 500; *Boulton* v. *Rowland,* 4 O. R. 720, and *Beatty* v. *O'Connor,* 5 O. R. 747).

[See as to cost of ploughing land, at end of book.]

CHAPTER XIX.

Attornment Clauses.

The question of the extent of the effectiveness of an attornment clause has been of late frequently before the Courts, chiefly with respect to the power to distrain upon the goods of others than the mortgagor, and the power to distrain under the provisions of 8 Anne, c. 14, Ruff. (c. 18 in Revised Statutes). This question may be most effectively dealt with by considering first the validity of these clauses apart from Torrens System mortgages, and subsequently considering the exceptions engrafted on the general law by the peculiarities of that system. The general principle is laid down in *Re Bowes Ex parte Jackson,* 14 C. D. 725, where Chitty, L.J., states that a mortgagor and a mortgagee have a right to insert in their mortgage deed a clause making the mortgagor attorn as tenant to the mortgagee, and thus *by contract constituting the relation of landlord and tenant* between the two.

A distinction must be drawn between the effect of an attornment clause and that of an express power of the mortgagee to enter and distrain. Under the latter the mortgagee can only take the mortgagor's goods; under the implied power of distress the mortgagee may take any goods he finds on the demised premises: *In re Willis,* 57 L. J. Q. B. 634, per Lindley, L.J.

The rent must be fair and reasonable. (As to what is a fair and reasonable rent see *Ex parte*

Williams, 7 C. D. 138; *In re Stockton Iron Furnace Company,* 10 C. D. 335; 48 L. J. Ch. 417; *Ex parte Jackson,* 14 C. D. 725; *Ex parte Voisey,* 21 C. D. 442; *Hobbs* v. *Ontario Loan & Debenture Co.,* 18 S. C. R. 483; *Stikeman* v. *Fummerton,* 21 Man. L. R. 754. See also 6 C. L. T. 217, 265, 313; *McKay* v. *Grant,* 30 C. L. J. 70; *Waterous Engine Works* v. *Wells,* 16 W. L. R. 274; *Independent Lumber Co.* v. *David,* 1 W. W. R. 134, 19 W. L. R. 387; *Thomas* v. *Cameron,* 8 O. R. 441). The attornment clause must not be merely a device to evade the bankruptcy laws.

The case of *In re Stockton Iron Furnace Company, supra,* demands especial attention for many reasons: first, it was a case of a mortgage in which the legal estate was not parted with, being a mortgage of copyholds by covenant to surrender; and secondly, Jessel, M.R., makes clear, what is sometimes forgotten, viz., that what is called an attornment clause is often more than a mere attornment, (*i.e.,* a mere acknowledgment of a tenancy), and is or amounts to an agreement for a tenancy; and James, L.J., is clear on the point that the creation of the tenancy operates to give the mortgagees all the liabilities of mortgagees in possession, and further to give them all the rights and incidents of the relationship between landlords and tenants, both as regards the parties themselves and a third person whose goods happen to be on the property.

Bramwell, J., suggests the reason why the law should look with equanimity on a mortgagee landlord asserting his right to seize the goods of a third party upon the mortgaged premises. "The law,"

says he, "does not forbid them entering into such an arrangement as this, *taking all the beneficial and all the inconvenient consequences arising from it.*"

Lastly, the case shows that the rent may be fluctuating in amount, the mortgage being given to secure a current account. A rent is certain, if by calculation and upon the happening of given events it becomes certain.

As to a valid attornment clause (*i.e.,* a clause which by agreement creates a tenancy, as distinct from being a mere acknowledgment) being potent to give the mortgagee the full rights of a landlord, see also *Kearsley* v. *Phillips,* 11 Q. B. D. 621.

The relationship created by an attornment clause is not the ordinary relationship of landlord and tenant, but it is the ordinary relation of mortgagee and mortgagor.

In equity the mortgagor was the owner of the estate, and the mortgagee was only entitled to a charge upon it; at law the mortgagee was the legal owner of the estate, and the mortgagor was what was called tenant at will, a very peculiar kind of tenancy. That was the legal relationship between the parties. The relation in equity was totally different. In an ordinary case there being no rent reserved, the tenant at will did not pay any rent, and was not liable to pay any; but you might superadd to that legal relationship an express agreement for a tenancy. That altered the legal relationship between the parties, but it did not alter the equitable relation. The rent, if paid, was in equity paid on account of principal and interest;

if it exceeded the interest, it would go in reduction of the principal. It was the subject matter of account between the mortgagee and the mortgagor, therefore in equity the mortgagee remained only a chargee, and the mortgagor remained the owner of the estate, notwithstanding this variation in the ordinary legal relation between them (*Ex parte Isherwood,* 52 L. J. Ch. 370, per Jessel, M.R.).

The position that the relationship of landlord and tenant in no way overrides the original relationship existing between the parties as mortgagor and mortgagee, is further emphasized by the case of *Ex parte Punnett,* 50 L. J. Ch. 212.

From this case it is apparent that but little stress is laid on the possession of the legal estate by the mortgagee. Jessel, M.R., bases the existence of a tenancy between mortgagor and mortgagee *entirely upon agreement,* and can see no reason why the relationship of landlord and tenant should not exist between two mortgagees and a mortgagor at one and the same time: "If the second mortgage created the relation of landlord and tenant, which it did by the operation of a legal fiction," he says, "I am not at all finding fault with legal fictions—they are necessary for the purposes of justice (they are merely a mode of putting in legal form the contracts of the parties)—if that is so, does it make any difference that there was a prior attornment to a prior mortgagee? I do not see how it can. If by a contract, notwithstanding the fact is known that the legal estate is outstanding in a mortgagee and that the mortgagor is not really the owner of the reversion, you can create a tenancy between the

second mortgagee and the mortgagor by what may be called estoppel or *quasi-estoppel* (it does not matter what term we use), it appears to me that there is nothing either in law or good sense to prevent the same arrangement being made with more than one mortgagee, otherwise this would happen: If a mortgage were made to two mortgagees by the same deed, and the mortgagor were to attorn tenant to the two mortgagees, there being a proviso between themselves that the one should be first and the other second, that would be good; but if the one mortgage were made by a deed dated the day after the other it would be bad. It appears to me that that would be a mere over-refinement, and consequently having regard to the decisions which I have mentioned (*Morton* v. *Woods*, 9 B. & S. 632), I think that the right to distrain exists, and that effect ought to be given to it."

It is thought that a not unfair deduction from these authorities is that in England the attornment clause creates the relationship of landlord and tenant by the operation of a legal fiction, which takes no account of where the legal estate is, and that that relationship carries with it the right to distrain upon the property of third parties, a logical result from the existence of the relationship, in which there is nothing inequitable, inasmuch as the mortgagee whilst reaping the benefit of the relationship in his power of distress, also submits to the burdensome inconveniences of being a mortgagee in possession.

In accordance with these principles it has been held that attornment to a receiver appointed by

the mortgagor and mortgagee creates the relation of landlord and tenant between the parties to which the right to distrain is incident, and also that it is immaterial that the want of a legal estate appears in the instrument by which the tenancy is constituted (*Jolly* v. *Arbuthnot,* 4 De G. & Jo. 224, and *Morton* v. *Woods, supra*).

In Manitoba it is provided that the right of mortgagees to distrain for interest due upon mortgages shall be limited to the goods and chattels of the mortgagor only, and, as to such goods and chattels, to such only as are not exempt from seizure under execution (R. S. M. c. 49, s. 2).

In *Linstead* v. *Hamilton Provident and Loan Soc.,* 11 Man. L. R. 199, it was held that section 2 of the Distress Act, Manitoba, had no application to the rights of mortgagees to distrain for rent *qua* rent (*i.e.,* not *eo nomine* as interest), under a tenancy validly created, distinguishing the apparently contradictory cases *Edmonds* v. *Hamilton Provident and Loan Society, infra,* and *Trust and Loan Debenture Co.* v. *Lawrason,* 10 S. C. R. 679, as being a case in which no rent was reserved, and *Hobbs* v. *Ontario Loan and Debenture Co.,* 18 S. C. R. 483, as a case of unreasonable rental. See also *Miller* v. *Imperial Loan & Investment Co.,* 11 Man. L. R. 247, where, however, the warrant seems to have commanded the levy for interest *eo nomine*).

A similar Ontario provision (The Mortgage Act, R. S. O. 1887, c. 102, s. 316), was in *Edmonds* v. *The Hamilton Provident Society,* 18 O. A. R.

347, declared to be remedial and intended to protect the goods of strangers to the mortgage, and accordingly restrictive of the right of distress under an attornment clause. "Its intention was," Osler, J.A., says, "to reach every case in which the mortgagee, whether in the character of landlord or licensee, but still under and for the purposes of the mortgage, had the right to distrain." See, however, *Pegg* v. *Independent Order of Foresters,* 1 O. L. R. 97.

It should be noted that in *Edmonds* v. *Hamilton Provident and Loan Society, supra,* the warrant was directed against the mortgagors by name, and comprised arrears of instalments for which admittedly the goods of a stranger could not be distrained, as well as of interest, and section 6 of the same Ordinance provides that the goods distrained for such interest or principal shall not be sold except after such notice as is required to be given by a landlord who sells goods distrained for rent.

The clause considered in the case was in the following words: "The mortgagors do attorn to and become tenants at will to the mortgagees, at a rent equal in amount to the interest hereby reserved, payable at the times mentioned in the above proviso: Provided that the mortgagees may distrain for arrears of interest: Provided that the mortgagee may distrain for arrears of instalments."

In *Re Chalmers and Freedman,* 10 W. L. R. 434, a Manitoba case, *Edmonds* v. *The Hamilton*

Provident Society, supra, was followed without comment.

By the Ordinance respecting Distress for Rent and Extra-Judicial Seizure (Alta.), section 5, applicable to Alberta and Saskatchewan, it is provided that the right of a mortgagee of land, or his assigns, to distrain for interest in arrear or principal due upon a mortgage shall, notwithstanding anything stated to the contrary in the mortgage, or in any agreement relating to the same, be limited to the goods and chattels of the mortgagor or his assigns, and as to such goods and chattels to such only as are not exempt from seizure under execution.

In *Hall* v. *Welman,* 5 W. W. R. 6, Beck, J., suggested that, owing to the obviously intentional difference between the wording of the Ontario and Manitoba statutes, and that of the Alberta enactment, such cases as *Linstead* v. *Hamilton P. and L. Soc., supra,* were not applicable in the interpretation of the Alberta statutory provision.

In *Vousden* v. *Hopper,* 16 W. L. R. 294, *Edmonds* v. *Hamilton Provident and Loan Society, supra,* was expressly approved, and it was pointed out that the addition of the words " notwithstanding anything stated to the contrary in the mortgage or in any agreement relating to the same," made the intention of the North-West Assembly in that direction much more emphatic. The case further decided that the tenant of a mortgagor is not an assign. Johnston, J., held also that the only recourse a mortgagee could have against a tenant of the mortgagor under a lease made after the

mortgage, would be that of an action or proceeding for the recovery of possession, in reliance upon *Rogers* v. *Humphreys,* 4 A. & E. 299, and *Evans* v. *Elliott,* 9 A. & E. 342.

In *McDermott* v. *Fraser,* 8 W. W. R. 196, and *Sturgeon* v. *Henderson,* [1917] 3 W. W. R. 56, the *Linstead* case was expressly approved.

In *Great West Saddlery Co. Ltd.* v. *Griesbach,* 9 W. W. R. 528, it was held, in reliance on *Tadman* v. *Henman,* [1893] 2 Q. B. 168, and *Jellicoe* v. *Wellington Loan Co.,* 4 N. Z. L. R. (S.C.) 330, that a tenancy created by an attornment clause to secure mortgage interest is one created by estoppel, and binds those privy to the estoppel, but not third parties, and further, that the fact that the mortgagee has neither the legal estate in the mortgaged lands, nor any reversion, does not disentitle him from distraining, applying *Morton* v. *Woods, supra,* and *Ex parte Punnett, supra.* (See also *Thomson* v. *Finlay,* 5 N. Z. L. R. (S. C. 203).

In *Hyde* v. *Chapin,* 9 W. W. R. 1142, the Appellate Division of Alberta held that the ordinary attornment clause, though it might create contractual rights of distraint between the parties, could not create any real tenancy in the mortgagor so as to give the mortgagee the benefit of the statute of 8 Anne, c. 14.

The matter is of such importance that it is thought best to give the judgment of Stuart, J., in full:—

" The facts are that the Chapin Co. are execution creditors of one Michael Kunkel and one Anna Kunkel by virtue of a writ of execution filed

in the sheriff's office for the Judicial District of Macleod on July 27th, 1914, which writ is still in force and unsatisfied. On March 1st, 1908, Anna Kunkel had given a mortgage on certain lands for the sum of $2,612 in favour of Hyde and had remained in possession of the lands covered by the mortgage. The mortgage contained an attornment clause in the following words:—

" ' And we do attorn and become tenant from year to year to the mortgagee from the day of the execution hereof at a yearly rental equivalent to, applicable in satisfaction of, and payable at the same time as, the interest upon the principal hereinbefore provided to be paid; the legal relation of landlord and tenant being hereby constituted between the mortgagee and ourselves, but it is agreed that neither the existence of this clause nor anything done by virtue thereof shall render the mortgagee a mortgagee in possession so as to be accountable for any moneys except those actually received.'

" The rate of interest payable under the mortgage was 7 per cent. per annum payable yearly. The yearly interest was $182.82. On September 10th, the execution creditor seized the crop grown on the land. By arrangement the crop was sold and the sum of $472 was left in the sheriff's hands pending a decision by the Court upon the point whether the mortgagee had a claim to one year's interest or one year's rent in priority to the execution creditor.

" The mortgagee claims priority by virtue of the provisions of the statute 8 Anne, c. 14, s. 1, which begins and proceeds as follows:—

"'For the more easy and effectual recovery of rents reserved on leases for life or lives, terms of years, at will, or otherwise, be it enacted, etc., that from and after (a certain date) no goods or chattels whatsoever lying or being in or upon any messuage, lands or tenements which are or shall be leased for life or lives, terms of years, at will, or otherwise, shall be liable to be taken by virtue of any execution * * *' unless the execution creditor first satisfies the landlord's claim for rent to the extent of one year's arrears but no more.

"The question is whether this statute applies to such a case as the present. The learned Judge below thought that it did, and gave judgment in favour of the mortgagee. The execution creditors appeal.

"It appears that the only point involved arises out of the difference between our mortgages and mortgages in England. In the latter the fee is conveyed to the mortgagee and an attornment in a mortgage there is therefore to a person holding the legal estate. Under our mortgages the legal title does not pass, but remains in the mortgagor.

"It is clear that where there is an attornment clause in an English mortgage the statute applies and the mortgagee is protected, *qua* landlord: *Yates* v. *Ratledge,* 5 H. & N. 248; Foa on Landlord and Tenant, 5th ed., p. 175; *Cox* v. *Leigh,* L. R. 9 Q. B. 333; 43 L. J. Q. B. 123.

"We are, it seems, face to face with one of the difficult problems which inevitably arise from the necessity, or supposed necessity, of attempting to engraft upon our system of land titles principles

of the English law, statutory and otherwise, which were developed and worked out under a different system altogether. There is no question which has so profoundly affected English decisions (I do not mean merely upon the particular point involved in this case, although in *Yates* v. *Ratledge* the reference to the matter is very pointed) as the question, who has the legal estate in fee simple?

"There is no doubt that in such cases as *Morton* v. *Woods,* L. R. 4 Q. B. 293; 38 L. J. Q. B. 81, the mortgagee's right to distrain was held to exist even though, being only second mortgagee, he did not possess the legal estate. But while it may be an immaterial matter who holds the legal estate as long as the mortgagor does not, but has parted with it, it seems to me it is not so clear by any means that the fact that the mortgagor himself holds the legal estate in fee simple and has never parted with it, may not have a very decisive influence upon the result.

"How can the mortgagor be at the same time the owner of the legal estate in fee simple and also a tenant for a term of years? This could indeed happen if he had granted a lease, for example, for life, and then had taken a sub-lease for a lesser term to himself because another estate would have intervened and there would be no merger. Foa, 5th ed., p. 528.

"But is there any intervening estate here? Certainly there is no legal estate. The mortgagee has a charge on the land to secure the repayment of his money. This charge is no doubt recognized by the statute, and may be registered under the

statute, which is made notice to third parties. But in so far as the legal position between the parties is concerned, aside, of course, from a statutory legal right created by registration, there is nothing more created, it seems to me, than that equitable charge defined by Halsbury, Vol. 21, p. 83, as 'a security which does not transfer the property with a condition for reconveyance, but only gives a right to payment out of the property, entitles the holder to have the property comprised therein sold to raise the money charged thereon * * * and the strict mode of enforcing it is by sale and not by foreclosure.'

"Is it possible to say that the legal relation of a tenant to a landlord was really created by the clause in question so as to bring about the operation of the Statute of Anne? In an English mortgage the fee is conveyed, and of course the holder of the fee can take the grantor as his tenant if they both so agree. And even to a second mortgagee the mortgagor may attorn and become tenant because he has no legal estate in the land at all, but only an equitable right to redeem. But where he is the owner of the fee simple himself how can he be a tenant to the person to whom he has given a mere statutory charge? It may be true that the mortgagee has an equitable interest or a statutory charge which he can deal with and alienate, but certainly, if he can grant a lease of it, and assuming that he can, that would be a different thing from a lease of the land itself upon which his charge (which is his equitable estate) rests.

"For these reasons I think the attornment clause in our forms of mortgages cannot create any real tenancy in the mortgagor, no matter what the parties say, so as to bring in the Statute of Anne. No doubt it is valid, as creating merely contractual rights, between the parties, and the mortgagee by virtue of the license given him may distrain if there is no legal impediment in his way. But the seizure by the sheriff puts the goods *in custodia legis* and the Statute of Anne does not help the mortgagee.

"This view is the basis of the decision in *Jellicoe* v. *Wellington Loan Company,* 4 N. Z. L. R. 330, a case under a similar statute of Land Titles.

"With much respect, I do not see the application of the rule that a tenant cannot deny his landlord's title. That rule applies where there has been in very fact a demise or an attornment. But even then where the tenancy is alleged to have arisen in the first place by estoppel then the tenant is not estopped from denying title in the person claiming to be his landlord. See Foa, 5th ed., p. 462. Nor do estoppels hold as against third parties."

In *Rollefson* v. *Olson,* 8 W. W. R. 481, Haultain, C.J., and Elwood, J., seem to approve of the validity of an attornment clause to protect a mortgagee against execution creditors, though Brown, J., was of opinion that the leasing power of a mortgagee must depend on a prior proper exercise of his statutory power to take possession in reliance upon the dicta of the majority of the members of the Supreme Court as to the exercise of the power

of sale in *Smith* v. *National Trust Co.*, 45 S. C. R. 618.

In *The Traders Bank of Canada* v. *Rutherford*, 10 W. W. R. 796, McLorg, D.C.J., followed *Hyde* v. *Chapin, supra,* distinguishing *Independent Lumber Co.* v. *David, supra,* as being a case of vendor and purchaser, and not of mortgagor and mortgagee, and *Rollefson* v. *Olson, supra,* as being an expression of opinion given *obiter.*

In the *First National Bank* v. *Cudmore,* 1917, 2 W. W. R. 479, the Supreme Court of Saskatchewan *en banc* followed *Hyde* v. *Chapin, supra,* as to the effect of an attornment clause, holding that such a clause can do no more than create by estoppel the relationship of landlord and tenant as between the parties and their privies, " an execution creditor not being a privy," and so give merely a personal right to the mortgagee and impose only a personal liability upon the mortgagor.

The case also decided that when a mortgagee gives a lease to the mortgagor the lease effects a surrender by operation of law of whatever term exists under an attornment clause in the mortgage, in reliance upon *Dodd* v. *Acklom,* 6 Man. & G. 679; *Lyon* v. *Reed,* 13 M. &. W. 306, and *Nicholls* v. *Atherstone,* 10 Q. B. 946.

In his own language the far reaching effect of a decision on the point must be the justification for quoting the judgment of Haultain, C.J., on this point *in extenso.*

" The attornment clause in question is as follows:

" ' And for the purpose of better securing the punctual payment of the interest on the said prin-

cipal sum, I the mortgagor do hereby attorn tenant to the mortgagees for the said lands at a yearly rental equivalent to the annual interest secured hereby to be paid yearly on each day appointed for the payment of interest, the legal relation of landlord and tenant being hereby constituted between the mortgagees and the mortgagor. Provided also that the mortgagees may at any time after default in payment hereunder enter into and upon the said lands or any part thereof, and determine the tenancy hereby created without giving me any notice to quit; but it is agreed that neither the existence of this clause, nor anything done by virtue thereof, shall render the mortgagees in possession so as to be accountable for any moneys except those actually received.

" ' And, further, that if I shall make default in payment of any part of the said principal or interest at any date or time hereinbefore limited for the payment thereof, it shall and may be lawful for, and I do hereby grant full power, right and license to the mortgagees to enter, seize and distrain upon the said lands or any part thereof, and by distress warrant to recover by way of rent reserved as in the case of demise of the said lands as much of such principal and interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in like cases of distress for rent.'

" The mortgage is, apart from other special provisions, a ' mortgage ' made and registered under the Land Titles Act, R. S. S. c. 41.

" On this point I agree with the decision of the Alberta Court in *Hyde* v. *Chapin* (1916), 9 W. W. R. 1142; 33 W. L. R. 559, that an attornment clause in a ' mortgage ' under the Land Titles Act, though it may create contractual rights between the parties, does not create the relation of landlord and tenant so as to give the mortgagee the protection of the statute of 8 Anne, c. 14, s. 1. The same view was held by the New Zealand Court in *Jellicoe* v. *Wellington Loan Company,* 4 N. Z. L. R. 330. See also *Tadman* v. *Henman,* [1893] 2 Q. B. 168.

" The far reaching effect of a decision on this point may, perhaps, be my justification for its lengthy consideration.

" The decisions of the English Courts must be distinguished at the very outset on account of the difference between a mortgage deed and a ' mortgage ' under the Land Titles Act. Under a mortgage deed, the legal title is vested in the mortgagee and the mortgagor remains in possession of the mortgaged premises either by sufferance of or agreement with the mortgagee, and, in that case, ' the mortgagor is a tenant within the strictest definition of that word:' *Partridge* v. *Bere* (1822), 5 B. & Ald. 604.

" Although it is not quite clear from the authorities in what position the mortgagor stands in respect of the mortgagee, during the mortgagor's actual possession or receipt of the rents, it seems, however, to be established that he will be considered as tenant for a term or at will, or at sufferance or as a trespasser, according to circum-

stances:' Coote on Mortg. (2nd ed.), 389. *Hitchman* v. *Walton,* 4 M. & W. 409, at p. 413; 8 L. J. Ex. 31. See also note to *Partridge* v. *Bere, supra.*

" In England prior to the Bills of Sale Acts, 1878 and 1882, attornment clauses in mortgage deeds, when valid, gave the same right of distress, including that of seizing the goods of third parties on the land, as though the tenancy was an ordinary tenancy: *Kearsley* v. *Philips* (1883), 11 Q. B. D. 621; 52 L. J. Q. B. 581, and a tenancy created by attornment in a mortgage deed came within the provisions of the Statute of Anne: *Yates* v. *Ratledge* (1860), 5 H. & N. 249; 29 L. J. Ex. 117.

" In this case the mortgagees, *who were clothed with the legal estate, redemised* the premises to the mortgagors who attorned as tenant to them at a certain rent.

" See also *Brown* v. *The Metropolitan Counties L. A. Society* (1859), 28 L. J. Q. B. 236.

" In connection with the foregoing cases, see also *Hobbs* v. *The Ontario Loan and Debenture Company* (1890), 18 S. C. R. 483, per Strong, J., at pp. 492, 493; *Trust & Loan Co.* v. *Lawrason,* 6 A. R. 286; 10 S. C. R. 679.

" The tenancy created by a mortgage deed with an attornment clause is a real tenancy, because the legal ownership is in the mortgagee and *the mortgagor is in possession of the land by redemise* and the rent is incident to the reversion. All the incidents of a real tenancy are there.

" In the present case, all these elements are lacking. The legal ownership is in the mortgagor,

there is no foundation for a redemise, and the ' rent ' is not incident to the reversion.

" ' It is a maxim in law that the rent must be reserved to him from whom the state of the land moveth, and not to a stranger.' Co. Litt. 143, b.

" Bacon Abridgement, 7th ed., by Gwillim & Dodd:

" ' If the lord upon the donation had reserved to himself any gabel or rent and had afterwards granted the rent to a stranger, though the tenant had attorned or consented to the grant, yet the stranger could not distrain for the rent as the power of seizure, so the distress that was substituted in its place belongs only to him of whom the lands were and in whom the right of reverter was when the feudal deed was spent.'

" I shall now consider a number of cases cited on behalf of respondent in support of the opposite conclusion.

" *Jolly* v. *Arbuthnot* (1859), 4 De G. & J. 224; 28 L. J. Ch. 547; 45 E. R. 87, is a case where a mortgage deed was made to the mortgagee and a receivership deed was made contemporaneously by which ' the mortgagor and mortgagee appointed a receiver and constituted him their agent and attorney to receive the rents of the mortgaged property, and to use such remedies by way of entry and distress as should be requisite for that purpose. By the same deed the mortgagor attorned as tenant from year to year to the receiver.'

" On the mortgagor being found bankrupt it was held that, as against the assignees in bankruptcy, the relation of landlord and tenant had

been created between the receiver and mortgagor, and that the receiver was entitled to distrain and take the goods that had belonged to the mortgagor on the mortgaged premises.

" The fact that the mortgagee was a party to the deed containing the attornment clause distinguishes the facts of this case from the case of a mere attornment to a stranger. It would also appear that a private receiver may distrain when furnished with express authority: *Ward* v. *Shew* (1833), 9 Bing. 638; 2 L. J. C. P. 58.

" Lord Chelmsford, the Lord Chancellor, in giving judgment in *Jolly* v. *Arbuthnot,* p. 92, said:

" ' It appears to me, however, that the circumstance of the truth of the case appearing upon the deed is a reason why the agreement of the parties which it embodies should be carried out, either by giving effect to their intentions in the manner which they have prescribed, or by way of estoppel to prevent their denying the right to do the acts which they have authorized to be done. If attornment to a mortgagee would be good to create a tenancy in the mortgagor (which seems to be provided for by the 11th Geo. 2d, c. 19), why should not an attornment to a third person, with the consent of the mortgagee, operate either to *create a tenancy or to estop* all parties from denying that such a tenancy exists? The statement in the deed of the character with which Aplin was to be clothed in order to carry out the object of the parties, and the proof which it affords of his having no previous title to the land, appears to me to furnish no objection to the validity of the distress in question.'

"On the ground of estoppel alone the assignees in bankruptcy were bound by the agreement of their assignor, the bankrupt.

"In *Dancer* v. *Hastings,* 4 Bing. 2; 5 L. J. C. P. 3, a demise from a receiver was held *as against the lessee* to be a good lease to entitle the lessor to distrain and to estop the lessee from pleading non-tenant. In this case, the receiver was a receiver in Chancery and had a right to distrain: *Bennett* v. *Robins* (1832), 5 Car. & P. 379; *Pitt* v. *Snowden* (1752), 3 Atk. 750. See also *Ward* v. *Shew, supra.*

"A receiver appointed by the Court also has power to let for any term not exceeding three years: *Shaff* v. *Holdaway* (1863), mentioned in Daniell's Ch. Pr., 7th ed., vol. 2, p. 1443.

"In the case of *Morton* v. *Woods* (1869), L. R. 3 Q. B. 658, a mortgagor in possession, having already mortgaged in fee, executed a second mortgage in fee to the defendants and attorned tenant to the defendants at a certain rent. The defendants distrained for a year's rent. Shortly afterwards, the mortgagor was adjudicated a bankrupt and the plaintiffs were appointed creditors' assignees. The plaintiffs paid the defendants the rent and costs of distress under protest, and a question was stated for the opinion of the Court as to whether the distress was legal and valid. It was held that the parties having agreed that the relation of landlord and tenant should be established, the mortgagor was estopped from setting up that the defendants had no legal reversion. Here, again, the decision goes no further than to declare

a tenancy by estoppel between the parties and those claiming under them.

" In *Ex parte Punnett, In re Kitchin* (1880), 16 Ch. D. 226; 50 L. J. Ch. 212, the right of a second mortgagee to distrain under an attornment clause was upheld as against the trustee in bankruptcy. This case, again, goes no further than to decide that, notwithstanding the legal estate is outstanding in a prior mortgagee, a tenancy by estoppel or *quasi* estoppel can be created between the second mortgagee and mortgagor.

" The main point for decision in *In re Threlfall* (1880), 16 Ch. D. 274; 50 L. J. Ch. 318, was whether a tenancy created by an attornment clause in a mortgage deed was a tenancy from year to year or a tenancy at will. The right of the mortgagee to distrain against the trustee in bankruptcy under the Bankruptcy Act, 1869, s. 34, was upheld.

" In *Ex parte Voisey* (1882), 21 Ch. D. 442; 52 L. J. Ch. 121, the principal point for decision was whether the attornment clause in a mortgage deed was valid or merely a contrivance to defeat the law in bankruptcy. The attornment clause and the distress levied under it were held valid as against the trustee in bankruptcy. Sir George Jessel, M.R., at p. 456, says:

" ' In this case we have an attornment to the legal owner by deed executed by the tenant in possession and delivered to the legal owner—very good evidence of a tenancy—evidence, therefore, of an agreement for a tenancy, and as was said in *Ex parte Punnett,* that is an estoppel *in pais* which

would prevent the tenant from denying the tenancy.'

In *Kearsley* v. *Philips* (1883), 11 Q. B. D. 621; 52 L. J. Q. B. 581, a mortgage was created by way of demise for a term of years, and the mortgagor attorned and became tenant to the mortgagee at a certain rent. The mortgagor let the mortgaged premises to one King, who assigned his goods upon the premises to the plaintiff by a registered bill of sale. The mortgagees distrained under the attornment clause on goods assigned by King to the plaintiff. It was held that the distress was lawful. The cases of *Jolly* v. *Arbuthnot* and *Morton* v. *Woods* were cited by Lindley, L.J., in support of this finding, but Fry, L.J., at p. 626, says:

" ' The question as to the effect of an attornment is in truth immaterial; the real point is whether by the so-called attornment clause the defendants re-demised the premises to James Kearsley: I am of opinion that they did. But apart from that point the plaintiff's counsel have failed to satisfy me that in the case of a mere attornment the right to distrain a stranger's goods does not exist.'

" Nearly all the foregoing cases, as will be seen, deal with the right of the mortgagee under an attornment clause as against the trustee in bankruptcy. Apart from the limitation of the distress to one year's rent, the Bankruptcy Acts, from the earliest times down to the present, left the right of distres for rent intact, and from 1869 at least that right was reserved ' to a landlord *or other person* to whom any rent is due from the

bankrupt.' In addition to that broad reservation, the doctrine of estoppel applies to the trustee in bankruptcy to the same extent as it does to the mortgagor.

" *In re Threlfall, supra,* per Bacon, C.J., at p. 279:

" ' If you find that a man has become bankrupt, that he is represented by a trustee who can have no other rights in this case than the bankrupt himself could have had if he had not become bankrupt, and distress is levied for the rent which he owed to the landlord, is it necessary to have any other facts to deal with? The statute [the Bankruptcy Act, 1869, s. 34] is plain. The trustee can claim no right which the bankrupt could not have claimed. Suppose there had been no bankruptcy and distress levied, and the tenant replevied, then the law is clear.'

" From the foregoing, I come to the conclusion that the attornment clause in question cannot create a real tenancy, as in the case of a mortgage deed with a valid attornment clause, in which case a tenancy is created, provided the true effect of the deed is to create such a tenancy. As Fry, L.J., said in *Kearsley* v. *Philips, supra,* which decided that an actual tenancy was created *by re-demise,* ' the question as to the effect of an attornment is in truth immaterial: the real point is whether by the so-called attornment clause, the defendants re-demised the premises to James Kearsley,' the mortgagor.

" As between the parties, this clause cannot do more than to create the relationship of landlord

and tenant by estoppel. The mortgagor, or those claiming under him, must not be allowed to deny his deed. In other words, the deed must be truly interpreted and effect must be given to that interpretation as between the parties. In that event it is only binding between the parties and their privies. It was argued by counsel for the respondent that an execution creditor is a privy, but I can find no authority for the statement, while *Richards* v. *Jenkins* (1887), 18 Q. B. D. 451; 56 L. J. Q. B. 293, is a direct authority to the contrary. The estoppel should not be binding on execution creditors in any event, on the broad principle that a party should not be allowed by his own private instrument to defeat the object of an Act of Parliament to the prejudice of others who were not parties to the deed. *Everest* v. *Strode,* p. 225.

" The estoppel in this case is only an estoppel by deed and not an estoppel *in pais,* as in the cases of *Ex parte Punnett; Ex parte Voisey; Morton* v. *Woods; Dancer* v. *Hastings,* and other cases already referred to.

" The true principle of this estoppel (*in pais*) between a landlord and tenant is, that a tenant while in possession is estopped from disputing that, at the time *when he received possession,* the landlord from whom he received it had a good title to the premises. Two conditions are essential to the estoppel; first, possession; secondly, permission: *Everest & Strode,* 268-9; *Cook* v. *Whellock* (1890), 24 Q. B. D. 658, at p. 661; 59 L. J. Q. B. 329.

" This was the principle underlying the decision in *Dancer* v. *Hastings, supra,* where the

tenant *received possession* from the receiver in Chancery. The same idea is expressed in *Morton* v. *Woods, supra,* where it was held that the mortgagor *had received possession* from the mortgagee and entered on the premises and, therefore, was estopped from denying that the legal estate was in the landlord. Per Cockburn, C.J., at p. 668, and Lush, J., at p. 671.

" This distinction, however, though interesting, is not material, as an estoppel *in pais* only extends to persons claiming possession under the tenant: *Tadman* v. *Henman, supra.*

" In any event, where the person claiming as landlord is not the person by whom the tenant was let into possession of the premises, evidence may be received to show that the relation of landlord and tenant does not in fact exist: 13 Halsbury, p. 404; *Gregory* v. *Doidge,* 3 Bing. 474; 4 L. J. (O.S.) C. P. 159.

" While a lease may be created by estoppel when the lessor has nothing in the law, it is only effective against the person estopped, see note (p) at p. 373, 13 Halsbury.

" The clause in question, therefore, while it uses certain words ' can have no effect at all upon the reality of the circumstances:' Per Brett, L.J., in *Simm* v. *Anglo-American Telegraph Co.,* 5 Q. B. D. 188; 49 L. J. Q. B. 392.

" It only creates a personal right in the mortgagee to enforce the clause, and a personal liability on the mortgagor to have the clause enforced. It does not make a ' stranger ' a landlord, or make what is not rent, rent.

" It was also argued on behalf of the respondent that there has been express recognition of the mortgagee's right of distraint by several Territorial Ordinances and Provincial Statutes.

" Ordinance No. 9 of 1884 enacted that, after the first day of January, 1885, ' the right of mortgagees to distrain for interest due upon mortgages shall be limited to the goods and chattels of the mortgagor only and as to such goods and chattels, only such as are not exempt from seizure under execution.'

" The ' right of mortgagees to distrain for arrears of interest ' must refer to the proviso in the short form of deed of mortgage in the schedule to Ordinance No. 1 of 1881,' ' An Ordinance respecting Short Forms of Indenture.' The short form of the proviso is, ' provided that the mortgagor may distrain for arrears of interest,' and the extended form is identical with the form in the Ontario Act which was under consideration in *Trust & Loan Co.* v. *Lawrason,* mentioned above. In that case, the form in question was held not to create a tenancy, and the distress provided for was not to be for rent, but for interest to be recovered in the same way as rent.

" Ordinance No. 16 of 1898, s. 1, enacted:

" ' 5. The right of a mortgagee of land or his assigns to distrain for interest in arrear or principal due upon a mortgage shall, notwithstanding anything stated to the contrary in the mortgage or in any agreement relating to the same, be limited to the goods and chattels of the mortgagor or his assigns, and as to such goods and chattels, to such

only as are not exempt from seizure under execution. [Section 5 of c. 34 of C. O. 1898].

" ' And the same provision is contained in our statute book to-day (R. S. Sask., 1909, c. 51, s. 5).'

" I do not see how the use of the expression ' the right of a mortgagee to distrain ' can be taken as conferring any greater rights than he actually had at the time. The legislature can only be taken as saying to mortgagees, ' Whatever rights you may have by law or by contract shall hereafter be limited.' The principles of interpretation laid down in sections 18 and 19 of the Interpretation Act (R. S. Sask., c. 1) should apply."

Although the law in Alberta and Saskatchewan now seems to be well settled, to the effect that under an attornment clause in a Torrens system mortgage the mortgagee cannot claim the protection of the statute of 8 Anne, c. 14, s. 1, yet it may not be altogether impertinent to suggest some reasons why these decisions are not altogether satisfactory. To begin with, *Tadman* v. *Henman, supra,* is the decision of a single Judge of the King's Bench Division, and at best only decides that where a person having no right whatsoever to demise, does so, the goods of a licensee of the tenant by estoppel cannot be distrained upon. If it is to be taken as an authority to the effect that the goods of third persons can under no circumstances be so distrained, then it is in direct opposition to *Syllivan* v. *Stradling,* 2 Wils. 208. Next, more stress seems to have been laid on the necessity of the presence of the legal estate than is warranted by the English decisions, and it seems to have been taken for

granted that the typical English mortgage vests the legal estate in the mortgagee; though it would not be incorrect to say that mortgages which fail to convey the legal estate are many times more numerous. Thirdly, the position of a mortgagee with statutory powers of entry into, possession, leasing of the mortgaged premises and foreclosure, is very closely analogous to that of a mortgagee with the legal estate, and bears but the shadowiest resemblance to that of an equitable charge in England.

The broad reasons given by the Judges of the English Court of Appeal for their findings in favour of the validity of attornment clauses, and their seeming neglect of the whereabouts of the legal estate, have not perhaps been taken sufficiently into consideration. Cotton, L.J., in *Ex parte Jackson,* 14 C. D. 725, says undoubtedly a mortgagor and a mortgagee have a right to insert in their mortgage deed a clause making the mortgagor attorn as tenant to the mortgagee, and thus by contract constituting the relation of landlord and tenant between the two. Under such circumstances, where it is a real and not a fictitious or sham arrangement, *the ordinary consequences of a tenancy follow,* and there can be a distress for the rent agreed upon, which will be valid and effectual in the case of bankruptcy. As has been pointed out by Lord Justice Baggallay, this is quite reasonable, for the mortgagee has a right to take possession by himself or by his tenant. If the mortgagor is in possession by a tenant, then the rent which that tenant pays comes into the hands of the mortgagee.

If the property is in the possession of the mortgagor himself, the mortgagee may turn him out and let the property either to a stranger or to the mortgagor; and therefore there is nothing unreasonable, or that can be called a fraud on the law of bankruptcy, in allowing the parties to make a contract in the mortgage deed, which they might validly and effectually make afterwards. If the mortgagee lets to a third party, no question arises.

It is true that the mortgagee's right to take possession does not under the Torrens system arise until after default in the payment of interest, but neither does the power of distraint under an attornment clause. After such default the mortgagee can at once enter and lease upon what terms he will. It can scarcely be said that it is more unreasonable in the one case than the other to allow the parties to make a contract in the mortgage deed which they might validly and effectually make afterwards. The contract, if made after the entry, would in both cases, it seems, create an actual tenancy with all its attendant rights, including that of distraint.

In the passage from *Ex parte Punnett* quoted *supra,* Jessel, M.R., says there may be an attornment between the mortgagor and each of two mortgagees; there is nothing either in law or good sense to prevent such an arrangement being made. "Otherwise," says he, "this would happen, if a mortgage were made to two mortgagees by the same deed, and the mortgagor were to attorn tenant to the two mortgagees, there being a proviso as between themselves that the one should be first and

the other second, that would be good, but if the one mortgage were made by a deed dated the day after the other, it would be bad. It appears to me that that would be a mere over-refinement."

It seems not unlikely that the same Judge would have thought it an over-refinement that a transfer of land by way of security, and a contemporaneous attornment by the transferor to the transferee, should result in a valid tenancy, but that a statutory mortgage with all its attendant powers would prevent any such result.

Another ground for holding an attornment clause good has been mentioned, namely, that the mortgagee by undertaking the heavy onus of being a mortgagee in possession, is only fairly requited by being allowed to reap all the benefits of his position as lessor.

It is true that it is by no means an unanimous opinion that the mere insertion of an attornment clause renders the mortgagee a mortgagee in possession, so as to be liable to account on the footing of wilful default. In favour of this view are Lord Justice James and Lord Justice Bramwell in *Re Stockton Iron Furnace Co., supra*; Sir George Jessel in *Ex parte Punnett,* and Day, L.J., in *Green* v. *Marsh,* [1892] 2 Q. B. 385. Whilst on the other side are the dictum of Lord Selborne in reply to a counsel, who in his argument relied on *Re Stockton Iron Furnace Co.* "That is to say," says Lord Selborne, "as between himself and a subsequent mortgagee, you could not say he was in that position as regards the mortgagor."

Bacon, V.C., in *Stanley* v. *Grundy,* 22 C. D. 478, 52 L. J. Ch. 248, held that the attornment clause did not make a mortgagee a mortgagee in possession as against subsequent mortgagees; and it may be conceded that Bacon, V.C., in the latter case gives the true view of the case: "The mortgagee must take advantage of the attornment clause before he can be said to go into possession," or to put it in another way, the distraint and the entry into possession are identical or at any rate contemporaneous.

The case does not in any way seem to interfere with the proposition in the former cases, which is but the corollary of a well worn maxim, *Qui sentit onus, sentire debet et commodum.* The distraint imposes upon the mortgagee the liabilities of a mortgagee in possession, and *eo instanti* gives him the full rights of a landlord.

One of the arguments that is at the bottom of the refusal to admit the complete efficacy of these attornment clauses seems to be that the statutory mortgage is a mere charge. It may well, however, be regarded as something very much more than a mere charge. It is thought that what is generally meant by "a mere charge" is a charge imposed on property in cases where that which is secured is not a debt, *e.g.,* the ordinary portions charge imposed by settlement or will. A charge which springs from contract and secures a loan is, it is thought, in its essence of an entirely distinct nature. The latter charges are of a more or less modern origin, and it is possible to trace in

the decisions and dicta of Judges a tendency to approximate them as closely as possible to true mortgages. Kekewich, J., in *Sadler* v. *Worley,* [1894] 2 Ch. 170, enforced the floating charge created by a series of debentures by foreclosure, and in *Re Owen,* 1894, 68 L. J. Ch. 749, a clear distinction between the two species of charges emerges.

It seems to be a matter of regret that a broader view has not prevailed in Alberta and Saskatchewan, following out the lines laid down by that great master of equity, Mr. Maitland, in his lectures on Equity, where speaking of foreclosure he says at p. 284: "What can be done by a signed writing stating an agreement to grant a mortgage can be done also by a signed writing declaring that the land is charged with the repayment of the loan," or that hinted at by Lord Parker in *Kreglinger* v. *New Patagonia, etc.,* 83 L. J. Ch. 79, where he says: "The difference between transactions by way of equitable charge and transactions by way of conveyance with a proviso for reconveyance is chiefly important when, for the purposes of determining whether a particular stipulation ought or ought not to be rejected for inconsistency or repugnancy, the nature of the transaction has to be investigated." It does not seem that it would be going too far to speak of a statutory mortgagee as having a constructive legal estate, so many of the powers incident to the possession of the legal estate have been committed to him by statute.

With respect to the insistency in *Yates* v. *Ratledge, supra,* spoken of by Stuart, J., on the neces-

sity for the legal estate being in the mortgagee, it is respectfully suggested that the fact of its existence is emphasised solely to answer the argument that the lessor was not the beneficial owner. "True," is the reply, "but he had the legal estate, and that suffices."

Stuart, J., asks the question: "How can the mortgagor be at the same time the owner of the legal estate in fee simple and also a tenant for a term of years?" The reply is very respectfully given that he can very easily be so. Suppose two mortgages made by the expressed conveyance of the legal estate, and the first debt discharged and re-conveyance taken, both mortgages having contained attornment clauses. Is the attornment clause in the second mortgage no longer valid? Suppose a *cestui que trust* creates a mortgage by deed with an attornment clause and the trustee thereafter conveys to the *cestui que trust.* Is the attornment clause invalidated?

Bacon, in his Abridgement, 7th ed., v. 4, p. 850, says that he may even by contract bind himself to become tenant of his own land.

It was long contended in Scotland that the absurdity of a man being his own vassal necessarily inferred *ipso jure* a consolidation of estates thus circumstanced, but this subtlety has been fully refuted, and there is an end to all these doubts and questions (see Bell's Principles of the Law of Scotland, 341).

The position of a licensee, who under a license is working a patent right for which another has

got a patent is very analogous indeed to the position of a tenant of lands who has taken a lease of those lands from another. So long as the lease remains in force, and the tenant has not been evicted from the land, he is estopped from denying that his lessor had title to that land. When the lease is at an end the man who was formerly a tenant, but has now ceased to be so, may shew that it was altogether a mistake to have taken that lease and that the land really belonged to him; but during the continuance of the lease he cannot shew anything of the sort. It must be taken as against him that the lessor had a title to the land (per Lord Blackburn in *Clark* v. *Adie,* 46 L. J. Ch. 598, at 606).

The question as to whether a right of distress on the goods of third parties is incident to the relationship created by an attornment clause is, of course, quite distinct from the question as to the power to distrain under the provisions of 8 Anne c. 14.

In *Freeman* v. *Edwards,* 2 Ex. 732, there was a power in the mortgage to distrain for interest in like manner as if for rent reserved on a lease. The mortgage was of copyholds, and was made in the usual way by covenant to surrender and therefore did not convey the legal estate. In his judgment Baron Parke said: " Probably the argument that the grant operated so as to create a rent charge is correct; and if so the rent charge continued until the surrender and admittance." In this particular case the fact that a rent charge had

been created was of no avail, as it was, of course, merged on the subsequent surrender and admittance.

It appears from the case of *Saffery* v. *Elgood,* 1 A. & E. 191, that the goods of a stranger not shewn to hold the premises by title paramount to the rent charge may be distrained upon for arrears of the rent (see also *Johnson* v. *Faulkner,* 1842, 2 Q. B. 928, at 931).

All rents which have been created since the first day of the session of Parliament in 1730, may be recovered by distress in the same manner as rent reserved upon a lease (Landlord and Tenant Act, 1780, 4 Geo. II., c. 28). See also *Re Gerard and Beacham's Contract,* [1894] 3 Ch. 295; *Dodds* v. *Thompson,* L. R. 1 C. P. 133, and *Williams* v. *Hayward,* 1 E. & E. 1040.

In *Re Stockton Iron Furnace Co., supra,* the company gave a mortgage to their bankers by covenant to surrender, so that the legal interest in the premises remained in the company, and the company by the mortgage deed, attorned and became tenant of their bankers from year to year. Counsel brought forward the argument that the bankers had not the legal estate. Jessel, M.R., in his judgment does not directly notice the argument, but he shows clearly that in his opinion the whole matter depends largely on the agreement and intention of the parties. He says: "In the first place one must remember that according to the course of practice of conveyancers, when the mortgagor is occupying, so that there is no rent receivable to meet the interest,

it was the common practice that he should agree to become tenant. *There is nothing novel or remarkable in the mortgage. It is in the ordinary form.* It was part of the bargain that they should become landlord. What they did therefore was only for the purpose of exercising their right of distress, which is a right incident to their position of landlord." James, L.J., says: "The bankers probably did mean to get a security upon the chattels which otherwise they would not have had. But then they got that security upon the chattels by means which are not prohibited by law, they got it by means of an arrangement that they should be landlords, and that arrangement did carry with it the incident of distress. They were incurring liabilities as mortgagees in possession, and they have a limited right as landlords. It appears to me that they have *all the rights and incidents of the relationship between landlords and tenants, both as regards the parties themselves and a third person whose goods happen to be on the property.*"

Throughout the English cases on the subject of these attornment clauses there seems to be a tendency to distinguish between *estoppel* and the real creation of the relationship of landlord and tenant, by *what may be called estoppel or quasi-estoppel* (it does not matter what term we use) says Jessel, M.R., in *Ex parte Punnett, supra.* The distinction is illustrated by a query of James, L.J., in *Re The Stockton Iron Furnace Company,* which seems to make it clear that he was not prepared to acquiesce in the application of the ordinary rule that estoppels do not bind third parties to attornment

clauses. "A mortgagor owner of an estate lets to a farmer, and on the premises are another person's goods. Has not the mortgagor the ordinary rights of a landlord, though the legal estate be outstanding in the mortgagee?"

The opinion is ventured with much diffidence that as between mortgagor and mortgagee there is no question of estoppel in the proper sense of the word. There is an agreement for a tenancy and to effectuate the intention all the incidents of the relationship of landlord and tenant are annexed to that tenancy by the operation of a legal fiction. It is suggested that, when Jessel, M.R., in *The Stockton Iron Furnace Company,* speaks of *quasi* estoppel, and Lord Chelmsford, in *Jolly* v. *Arbuthnot,* speaks of carrying out the agreement of the parties either by giving effect to their intentions in the manner which they have prescribed, or by way of estoppel, and later on in his judgment says: "Of course, if a tenancy were created, the right to distrain would follow as an incident to it," it can scarcely be denied that Jessel, M.R., considered, and Lord Chelmsford inclined to the opinion, that by an attornment clause a tenancy was created between mortgagor and mortgagee irrespective of questions of reversion or legal estate, and that a right of distress was incident to it. It was not necessary for Lord Chelmsford to express any decided opinion on the subject, as the express power to distrain contained in the document in question was sufficient for the purpose of his decision.

It seems impossible that these Judges could have spoken of a mere right to distrain in gross as an incident to a tenancy.

Their view seems to have been, with respect to tenancies created by what is called an attornment clause, what with respect to tenancies in general has been given statutory recognition in Ireland by the Act of 1860 (Deasy's Act), which enacts that the relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent.

The competing view has been outlined to the author by a competent authority in the following words: "The sacredness in the old days attached to the ownership of land and the rights and remedies of an extraordinary character given to a landlord, appear to be an anachronism, especially in a new country. The spirit of the times and country tends to a restriction rather than an extension of such rights and remedies." With the words, there can be no disagreement, but it can be at least doubted whether *conscious* expression of the spirit of the times and country is not best left to legislation.

CHAPTER XX.

INSURANCE.

A mortgagee who insures the mortgaged property is not entitled to retain the amount of the insurance moneys, for his own use, if the property is destroyed or damaged during the subsistence of the security; but the insurers can claim on payment to have the whole or a proportionate part of the mortgage debt assigned to them (*Castellain* v. *Preston,* 8 Q. B. D. 613, 11 Q. B. D. 380).

As to the right of contribution where both mortgagor and mortgagee insure, see per Mellish, L.J., in *North British Insurance Co.* v. *London Globe Insurance Co.,* 5 Ch. D. 569, 583, 46 L. J. Ch. 537. "But I can see no reason why the principle in respect of contribution should not be exactly the same in respect of fire policies as it is in respect of marine policies, and I think if the same person, in respect of the same right, insures in two offices, there is no reason why they should not contribute in equal proportions in respect of a fire policy as they would in respect of a marine policy. The rule is perfectly established in the case of a marine policy that contribution only applies where it is an insurance by the same person having the same rights, and does not apply where different persons insure in respect of different rights. The reason of that is obvious enough. The cases where different persons insure the same property in respect of their different rights may be divided into two classes. It may be that the interests of the two

between them make up the whole property, as in the case of a tenant for life and remainderman. Then if each insures they may use words apparently insuring the whole property, yet each would recover from their respective insurance companies only the value of their own interest, and of course those added together would make up the value of the whole property. Therefore it would not be a case either of subrogation or contribution because the loss would be divided between the two companies in proportion to the interests which the respective assured had in the property. But then, there may be a case where, although two different persons insure in respect of different rights, each of them can recover the whole, as in the case of a mortgagor and mortgagee; but wherever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong to two different persons. Each of them may have an interest which entitles him to insure for the full value because, in certain events, if the other party becomes insolvent, it may be that he would lose the full value of the property, and therefore would have in law an insurable interest so that he can insure the full value. But yet, it must be that if each can recover the full value of the property from his insurer one must have a remedy over against the other. I think whenever that is the case the company which has insured the person who has the remedy over succeeds to his right of remedy over, and then it is a case of subrogation."

Money paid for insuring mortgaged property against fire was formerly not allowed whether the mortgagee were in possession or not, unless the insurance was effected and continued in accordance with the provisions of the mortgage deed (*Dobson* v. *Land,* 8 H. 216; *Bellamy* v. *Brickenden,* 2 J. & H. 137).

Where a mortgagor and mortgagee effected a joint insurance on the mortgaged property, the mortgagee paying the premiums, the mortgagor's assignees in bankruptcy were, on destruction of the premises by fire, directed to pay the insurance money into Court, there being no right in one of the parties to a joint security to apply the produce irrespective of the claims of the other.

Where a bill of sale of machinery to secure a loan provided that the mortgagor should insure, but contained no provision as to the application of the insurance moneys, it was held upon the destruction of the property that the mortgagee had no claim to the insurance moneys as against the mortgagor (*Lees* v. *Whitely,* 2 Eq. 143).

A mortgagor who covenanted to lay out insurance moneys in rebuilding the mortgaged property expended some of the money in building on adjoining property, but it was held that the mortgagee had no charge on such property for the amount of the money so expended as against a mortgagee of the adjoining property, although such mortgagee had notice of the covenant (*Harryman* v. *Collins,* 18 B. 11).

In *Westminster Fire Office* v. *Glasgow Provident Investment Society,* 13 Appeal C. 699, where

two mortgagees insured and the first mortgagee received sufficient to reinstate the destroyed mortgaged premises, but not enough to amount to the difference between the insurable value of the property and its value after deterioration by fire, the second mortgagee was held entitled to recover on his insurance. The statutory condition contained in policies of fire insurance requiring the company's consent to an assignment of the property insured refers to the absolute divesting by the insured of all title and interest in the property (*Trotter and Douglas* v. *Calgary Fire Insurance Co.*, 3 Alta. L. R. 12).

If a mortgage company, through its manager, undertakes with the mortgagor to keep alive an insurance on the mortgaged property, and takes steps towards carrying out such undertaking, but fails to carry it out, he is guilty of such negligence as to render him liable in damages to the mortgagee if ignorant of such failure, for the amount of such insurance, in case the property is burnt after the policy lapses (*Campbell* v. *Canadian Co-operative Investment Co.*, 16 Man. L. R. 464, following *Skelton* v. *L. & N. W. R.*, 2 C. P. 636).

Where a mortgagee voluntarily undertakes the duty of insurance, and fails to effect a policy, the mortgagor may set off the damages resultant from loss of the mortgaged premises by fire as against an assignee of the mortgage (*Campbell* v. *Canadian Co-operative Investment Co.*, 5 W. L. R. 153).

By the Fires Prevention Act, 1774, section 83, insurance offices are required, upon the request of any person interested in or entitled to any house

or other building burnt down or damaged by fire, to apply the insurance money in reinstating or repairing such house or building. It was held that the provisions of this enactment applied to insurance in England and Wales generally (*Ex parte Gorely,* 4 D. G. J., and Sm. 477), but the correctness of this decision has been doubted. (See *Westminster Fire Office* v. *Glasgow Investment Society,* 13 A. C. 699, per Lord Watson at 716, and per Lord Selborne at 713, but see also *In re Quickes Trusts,* [1908] 1 Ch. 887, at 893). Whether it could in any event be considered applicable to Canada is very doubtful.

CHAPTER XXI.

CONSOLIDATION.

The general principle of consolidation has been approved of by MacKay, J., in the *Saskatchewan General Trust Corprn.* v. *Thompson,* 10 W. W. R. 661, where he expressly approved of the statement in Robins on Mortgages, vol. 2, page 255, that the authorities lead to this conclusion that if two or more distinct mortgages be made of different estates between the same parties, or if a sum of money be advanced on one estate, and other estates be afterwards made a security for the sum already advanced, and also for further advances, although without any agreement that the first estate shall be charged with the further advances, nevertheless neither the mortgagor nor anyone claiming under him the equity of redemption of one of the estates, although without notice of the other mortgage or charge, shall be permitted to redeem one mortgage without redeeming both.

A right to consolidate the mortgagee's securities must in order to be effective be the subject of express stipulation (*Greig* v. *Watson,* 7 V. L. R. 79; *Wilkin* v. *Deans,* 6 N. Z. L. R. 425). In the first case one of the two portions of land, in the second, both were under the Act. It can hardly be doubted that a mortgagor who assented to such stipulation would be bound by it; whether the covenant would invariably bind his transferee where the other securities were statutory mortgages of land under the system, perhaps admits of some

doubt, and the point appears not to have been decided; on principle there would seem to be no reason why such a covenant should not bind transferees since it must necessarily, that is, in the absence of fraud or the grossest negligence, come to the knowledge of a person proposing to purchase the land from the mortgagor, but the *ratio decidendi* in *Wilkin* v. *Deans,* where it was held that the rules of a building society which were referred to in the mortgage were not thereby incorporated in it, is somewhat against this view of the effect of a covenant, since its practical effect would be to incorporate in the mortgage provisions in other mortgages, and thus run counter to the enactments which make the registered instruments the sole evidence of the rights of the party. Indeed *Wilkin* v. *Deans* might well be quoted to the effect that the doctrine of consolidation has been entirely superseded by the acts.

A transferee is not bound by the original mortgagor's assent to the right of consolidation where the other securities of the mortgagee consist of mortgages over land not under the system (Hogg, 947).

In England the tendency is against any further extension of the principle of consolidation, as appears from the provision, section 17 of the Conveyancing Act of 1881, which enacts that where the mortgages, or one of them, is made after the commencement of the Act, there is to be no right of consolidation, unless a contrary intention appears.

Where an owner mortgages two or more properties to the same person, he or his transferee can redeem one when the mortgage debt becomes payable without redeeming the other or others (*Jennings* v. *Jordan,* 6 A. C. 698).

Should the mortgagor or his transferee then fail to do so, the mortgagee is allowed to consolidate the debts and refuse to permit the redemption of one only (*Hughes* v. *Britannia Benefit Society,* [1906] 2 Ch. 607).

Where the mortgages were originally made to different persons the assignees of the equities of redemption are bound by the same rules when the assignments were made after the vesting of the mortgages in one and the same person (*Minter* v. *Carr,* [1894] 3 Ch. 498). There is no consolidation unless the different mortgages were made by the same mortgagor (*Sharp* v. *Rickards,* [1909] 1 Ch. 109).

CHAPTER XXII.

Mortgage of Mortgage.

In case of a mortgage by a mortgagee of his estate or interest in the mortgage, the person in whose favor such charge is created shall be deemed the transferee of such estate or interest, and shall have all rights and powers as such, subject to the provisoes and provisions expressed in the instrument creating the charge or implied therein by virtue thereof (Sask. Land Titles Act, sec. 98 (4)).

Upon the registration of any transfer or mortgage of a mortgage, encumbrance or lease, the mortgage or encumbrance, or the estate or interest of the transferor as set forth in such instrument, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee, and such transferee shall thereupon become subject to and liable for all and every of the same requirements and liabilities to which he would have been subject and liable if named in such instrument originally as mortgagee, encumbrancee, or lessee of such land, estate or interest (Man. Real Property Act, sec. 110).

There seems to be no provision in Alberta as to sub-mortgages, but there is no reason why they should not be created in the ordinary statutory form. It is said that in Australia in practice, an absolute transfer of the mortgage is more frequently taken, the sub-mortgagor being protected

by entering into a collateral agreement containing the terms of the transaction, and lodging a caveat (See Hogg, p, 964).

It has been held in New Zealand that as a sub-mortgage is a transfer of the estate and interest of the original mortgagee in the original mortgage, it follows that upon registration of the sub-mortgage no registrable interest is left in the original mortgagee and a transfer thereof not being of a registrable interest, cannot be registered (*Pott* v. *District Land Registrar,* 26 N. Z. L. R. 141).

CHAPTER XXIII.

Acceleration Clauses.

In *Sterne* v. *Beck,* 1 De G. & S. 595; 137 R. R. 307, there occurred in a mortgage deed the proviso that upon default being made in payment of any instalment of mortgage moneys (the debt being repayable by instalments), the whole unpaid portion of the debt with interest should immediately become payable. Turner, L.J., construed the proviso as not being in the nature of a penalty, but as expressing the mode in which under certain conditions the payment was to be made, the contract between the parties being that the sum should be payable by instalments, provided that they were punctually paid, but that in case of any default in paying, the whole should become payable at once. (See also *National Trust Co.* v. *Campbell,* 17 Man. L. R. 587; 7 W. L. R. 754; *Wallingford* v. *Mutual Society,* 5 A. C. 696; *Protector Endowment Company* v. *Grice,* 5 Q. B. D. 592; *Graham* v. *Ross,* 6 O. R. 154; *Tylee* v. *Hinton,* 3 A. R. 60; *Leeds* v. *Broadbent,* [1898] 1 Ch. 343, and *Wilson* v. *Campbell,* 15 P. R. 254).

The provisions of section 126 of the Real Property Act of Manitoba (which provides that the mortgagor may, notwithstanding any provision to the contrary, and at any time prior to sale or foreclosure, pay such arrears as may be in default under the mortgage together with taxed costs, and thereupon be relieved from the consequences of non-payment of so much of the mortgage money as

has not become due and payable by reason of the lapse of time), is applicable to a mortgage under the old system as well as to one under the new system (*National Trust Co.* v. *Campbell, supra*).

In *Wasson* v. *Harker,* 3 W. W. R. 218, the Supreme Court of Saskatchewan en banc construed sub-section 10 of section 93, of the Land Titles Act of Saskatchewan, in a similar way, and granted relief against acceleration, and it was further held that an assignment of the equity did not preclude relief against the acceleration clause. (This case disapproved of *McGregor* v. *Hemstreet,* 20 W. L. R. 642.)

In *Canada Co.* v. *Layton,* 10 W. W. R. 580, it was held that a default judgment might be signed in an action on the covenant under the mortgage calling for arrears, and also for principal due by virtue of an acceleration clause, but such judgment, in addition to reciting the full amount for which judgment was recovered, should also recite that the defendant will be relieved from the consequence of his default on payment of the amount of arrears in default with costs to be taxed.

It should be noticed that there does not appear to be any provision in the Alberta Land Titles Act as to relief in the case of these acceleration clauses.

CHAPTER XXIV.

Priorities Between Mortgages and Mechanics' Liens.

The Mechanics' Lien Act of Alberta, section 9, provides that where work or improvements are put upon mortgaged premises the liens by virtue of the Act shall be prior to such mortgages, as against the increase in value of the mortgaged premises by reason of such works or improvements, but not further unless the same is done at the request of the mortgagee in writing, and that the amount of such increase shall be ascertained upon the basis of the selling value upon taking of the account, or by the trial of an action or issue, as provided herein, and that thereupon the Judge may, if he shall consider the works or improvements of sufficient value to justify the proceedings, order the mortgaged premises to be sold at an upset price equal to the selling value of the premises immediately prior to the commencement of such works or improvements (to be ascertained as aforesaid), and that any sum realized in excess of such upset price shall be subject to the lien provided for by the Act. The moneys equal to the upset price as aforesaid are to be applied towards the mortgages according to their priority, but nothing in the section is to prevent the lien from attaching upon the equity of redemption, or other interest of the owner of the land subject to such mortgage or charge.

The word " mortgage " in the section does not include any part of the principal sum secured by

the mortgage, but not actually advanced to the borrower at the time the works or improvements were commenced.

The Mechanics' Lien Act, Manitoba, section 5b, provides that, in case the land upon or in respect of which work is done or materials or machinery are placed, be encumbered by a mortgage or other charge existing or created before the commencement of the work, or of the placing of the materials or machinery upon the land, such mortgage or other charge is to have a priority over a lien under the Act to the extent of the actual value of the land at the time the improvements were commenced.

The Saskatchewan Mechanics' Lien Act, section 5, provides that in case the land upon or in respect of which any work or service is performed, or upon or in respect of which materials are placed or furnished to be used, is encumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials, the lien under the Act is to be entitled to rank upon such increased value in priority to the mortgage or other charge.

A prior mortgage need not necessarily be registered at the time of the lien (*Cook* v. *Belshaw*, 23 O. R. 545).

As a lien may be registered immediately after the contract is made and before any work is performed, it would seem that a mortgage might be made before the commencement of the work, and yet not be a prior mortgage (see Wallace on

Mechanics' Liens, p. 353), but except in the case of actual notice the lien may be defeated by prior registration of a mortgage (see *Hynes* v. *Smith,* 27 Gr. 150; *Reinhart* v. *Shutt,* 15 O. R. 325; *Wanty* v. *Robins,* 15 O. R. 474; *West* v. *Sinclair,* 28 C. L. J. 119; 12 C. L. T. 44; *McVean* v. *Tiffin,* 13 O. A. R. 1, and *McNamara* v. *Kirkland,* 18 O. A. R. 271).

A lien does not take priority over advances made under a mortgage for future advances and before registry of the lien, and actual notice thereof (*Cook* v. *Belshaw,* 23 O. R. 545).

Where a mortgage is given to pay off prior incumbrances, the lien fails to attach to the extent of such incumbrances (*Locke* v. *Locke,* 32 C. L. J. 332).

A lien for materials only takes priority over a mortgage to the extent of the value of the material placed on the ground prior to the mortgage money being advanced (*Robock* v. *Peters,* 13 Man. L. R. 139.

The mortgagee is a necessary party to proceedings to enforce the lien against the increased value, and unless he is a party the premises must be sold subject to the mortgage (*Finn* v. *Miller,* 10 C. L. T. 23). See also on this section *Re Empire Brewing & Malting Co.*, 8 Man. L. R. 424, and *Flack* v. *Jeffrey,* 10 Man. L. R. 514.

Notice cannot affect the question of priority where the lienholder has not registered his lien, and the mortgagee need not hesitate to advance money legitimately under his mortgage because possibly the lienholder might thereafter register

his lien (*Sask.*) *Independent Lumber Co.* v. *Bocz,* 16 W. L. R. 316).

The onus of proving that the selling value of the land was increased by the materials furnished and placed above what it was before they were so furnished and placed is on the persons asserting the lien (S.C.).

The right of sub-contractors to a lien in priority to a mortgage is considered in *Colling* v. *Stimson,* 4 W. W. R. 597.

Where a mortgage is prior to a mechanic's lien and the property affected becomes depreciated in value, the loss must fall upon the lienholder, that is, the selling value of the land is not the value at the date of the completion of the work by reason of which the mechanic's lien attached, and it should, it seems, be measured by the price at which the property is actually sold (*National Trust* v. *Battell,* 9 W. W. R. 1265, referring to *Patrick* v. *Walbourne,* 27 O. R. 221, and *Broughton* v. *Smallpiece,* 25 G. R. 290).

As against a prior mortgagee the priority given to the mechanic lienholder in respect to the increase in the selling value of the property is only to the extent of his proportionate contribution to that increased value, but in calculating that proportion all of the material supplied or work done by the lienholder should be taken into account, whether included in the lien or not (*Sask. Security Lumber Co.* v. *Duplat,* 10 W. W. R. 1270).

For the purpose of arriving at the sum as to which the holder of the mechanic's lien should have priority over a prior mortgagee, the value of the

owner's property prior to the attaching of the lien may be ascertained, that value fixed at the upset price and a sale directed. The lien only attaches to the excess of the purchase price over the value so ascertained. Where there are several independent and consecutive contracts a lien can only be claimed under any one specific contract to the extent to which the work done under that contract enhances the selling value of the premises (*Champion* v. *World Building, Limited,* 10 W. W. R. 470, B.C.).

A mortgagee cannot do anything to prejudice the vested statutory right of the lienholder to a lien upon the property to the extent to which its value has been increased by the work or materials of the lienholder (*High River Trading Co.* v. *Anderson,* 10 W. L. R. 127).

CHAPTER XXV.

Right to Make Further Advances.

The right of a mortgagee to make further advances and to tack them on to the original mortgage, so as to exclude all intermediate encumbrances, can only arise when, by the terms of the original mortgage, further advances may be made by the mortgagee.

It has been held in Australia, that where the first mortgage authorized further advances, the first mortgagee may, in the absence of notice, and notwithstanding a caveat [this on the ground that a caveat does not affect dealing with property outside the Real Property Office, P. G. & G., p. 79], showing the existence of a second and registered mortgage, make further advances to the mortgagor, which will have priority over any subsequent mortgage (*Queensland Trustees* v. *Registrar of Titles,* 5 Q. L. J. 46; Hogg, p. 963). The fact that such subsequent mortgage was actually registered would seem to be immaterial.

In *Pierce* v. *Canada Loan & Savings Co.,* 25 O. R. 671, Boyd, C., held that the security of a first mortgage providing for further advances is not impaired unless notice of a second mortgage goes to the mortgagee, and after knowledge of this, he makes subsequent advances, and that in the absence of notice (that is, notice which gives him real and actual knowledge and showing facts), the mortgagee is entitled to assume and act on the assumption that the state of the title has not

changed. That protection is given to him by virtue of the Registry Act, says Boyd, C., as well as by the doctrine enunciated in *Hopkinson* v. *Rolt,* until he is made aware of a change, not by finding a hypothetical operation of an instrument registered subsequent to his, but by a reasonable communication of the fact by the one who comes in under the subsequent instrument. (See also *Hopkinson* v. *Rolt,* 9 H. L. C. 514; *Bradford Banking Co.* v. *Briggs,* 12 A. C., p. 36; *Union Bank of Scotland* v. *National Bank of Scotland,* 12 A. C., p. 95, and specially as to notice *West* v. *Williams,* [1899] 1 Ch. 132).

In the case of *Robinson* v. *Ford,* 7 W. W. R. 747, it was argued that the effect of registering the prior mortgage was to give the mortgagee the right to advance all of the money notwithstanding notice to him, but the Court en banc held that the mortgagee in making further advances after notice would be committing a fraud, and to the extent of such subsequent advance would not be a *bona fide* mortgagee.

It has been said that the equitable doctrine of tacking has been abolished (see *Reeves* v. *Konschur,* 10 W. L. R. 680), but it is suggested that when the question is not between registered mortgages, a second equitable mortgagee may by taking a transfer of a statutory mortgage become entitled to add the amount of his claim on the equitable mortgage to the sum due on the legal mortgage, in priority to all prior equitable mortgages of which he was *bona fide* ignorant when he gave the value for his equitable mortgage (see section 62a (8)

(Alberta), as to application of purchase moneys after statutory sale and corresponding sections in other Acts).

A first mortgagee of a ship, whose mortgage is taken to cover future advances, cannot claim over the second mortgagee, the benefit of advances made, after he has notice of the second mortgagee's mortgage (*The Benwell Tower,* 8 Asp. M. L. C. 13). This case is quoted owing to the close resemblance between the provisions of the Torrens Acts as to notice and those of the Merchant Shipping Acts. The rule, however, does not apply where the agreement as to future advances is contained in a separate unregistered document. (*Parr* v. *Applebee,* 24 L. J. Ch. 767.)

As to the non-applicability of the doctrine of tacking in general, see *Latouche* v. *Lord Dunsany,* 1 Sch. & Lef. 137.

CHAPTER XXVI.

FIXTURES.

A mortgagee by leaving his mortgagor in possession of the mortgaged premises impliedly authorises him to hire and bring and fix other fixtures necessary for his business, and to agree with their owner that he shall be at liberty to remove them at the end of the time for which they are hired. The right of the owner to unfix or remove things so fixed, ceases, however, when the mortgagee takes possession, but if the implied permission is at variance with the express language of the contract between the mortgagee and the mortgagor no implied permission can as between them be supported (*D'Augigney* v. *Brunswick Balke Collender Co.*, 1917, 1 W. W. R. 1331).

The case of D'Augigney was decided in reliance upon *Ellis* v. *Glover & Hobson,* [1908] 1 K. B. 388; 77 L. J. K. B. 251, but it is difficult to see how far the reliance is warranted. In the latter case Cozens-Hardy, M.R., and Farwell, L.J., held that as a general rule no authority ought to be implied from a mortgagee to a mortgagor in possession to remove trade fixtures affixed to the mortgaged premises. In that case *Gough* v. *Wood & Co.,* 63 L. J. Q. B. 564; [1894] 1 Q. B. 713, is carefully considered. The Court of Appeal in the latter case had regard to the nature of the premises mortgaged, that is, a leasehold nursery garden with the usual trees and plants and shrubs grown on it, and the Court of Appeal held that the mortgagee must be taken to have given implied authority to the mortgagor to agree to the removal of a boiler and

pipes installed under a hire-and-purchase agreement, Lindley, J., stating that "by leaving the mortgagor in possession, the mortgagee impliedly authorized him to carry on his business, and to sell and remove plants, trees and shrubs, which though fixed to the soil constituted his stock in trade. This implied authority can hardly be confined to such things, but can fairly be regarded, and I think ought to be regarded, as authorizing the mortgagor, whilst in possession, to hire and bring and fix other fixtures necessary for his business, and to agree with their owner that he shall be at liberty to remove them at the end of the time for which they are hired." Whilst, Kay, L.J., said: "The mortgagor was a nursery man carrying on his business on the land mortgaged; he was left in possession by the mortgagee, and during such possession it must be inferred that the mortgagee assented to the mortgagor doing everything that was usual and proper to enable him to trade as a nurseryman, for example, until prevented by the mortgagee taking possession, he might remove and sell the young trees he was cultivating for that purpose, though they while growing were a part of the land. If, then, while in such possession, he obtained the boiler and pipes upon an agreement which allowed the vendor to remove them if default was made in paying for them, why should not the mortgagee be taken to have assented to the vendor being allowed to remove them, just as a purchaser of trees might do with the consent of the mortgagor in possession?"

"But this reasoning," says Farwell, L.J., in *Ellis* v. *Glover, supra,* "has no application where

the mortgage is simply of a messuage or dwelling house with the fixed machinery then or thereafter to be affixed. There is nothing corresponding to the trees of the nurseryman from which an inference could be drawn which would extend to other fixtures."

It should be noted that the mortgaged premises (*Ellis* v. *Glover*) were of a laundry and fixed machinery.

Although the Court of Appeal distinguished *Gough* v. *Wood,* the vigorous dissenting judgment of Fletcher Moulton should be noticed. He says; "An attempt was made to distinguish the fact of *Gough* v. *Wood* from the facts of the present case, by the suggestion that in the case of *Gough* v. *Wood & Co.,* the mortgagor was a nurseryman, and therefore, must be considered to have had implied authority to remove young trees *for the purpose of sale,* even though they were fixed to the freehold, and that the Court were influenced by this, in coming to the conclusion that there was implied authority to remove the boiler and pipes. In my opinion we should be showing scant respect to the eminent Judges who decided the case of *Gough* v. *Wood,* if we were to suppose them capable of deciding that because a man being a nurseryman was entitled to take up and sell the young trees, therefore he must be entitled to take up and sell a boiler and hot water pipes. Moreover when the judgments were examined, it is in my opinion evident that the Court proceeded on no such extraordinary principle as is suggested. The judgments show clearly that the Court fully appreciates that it was

dealing with a general principle, and not with the case of a particular trade."

"It is too late at this time of day to contend that a regularly executed mortgage of a lease will not carry the fixtures of that property which is in lease and of which the deeds are deposited. I apprehend that the reason for that is not simply that the chattels are there in the house which has been so mortgaged, but because whilst attached to the land, although for the benefit of trade the law has held that trade fixtures may be at any time during the limited interest which the owner of the lease may have, removed by him, yet if he does not remove them during the lease, he is held to have allowed them to pass to the owner of the reversion, because and only because they are attached to this reversion, and if they are not removed, as the law would have enabled the person to remove them during the lease, he is held to have allowed them to pass to the owner of the reversion, because and only because they are attached to his reversion, and if they are not removed, as the law would have enabled the person to remove them during the lease, they must be considered to have passed over at once and finally to the owner of the reversion. The doctrine therefore was that they were a part of the land during the time they remained attached, but that for the benefit of trade, they might during the interest of that person who had only a partial interest in the land be removed so long as he had that interest, although there was no power whatever given to him for the purpose of removal if he chose to allow the time to pass during which he

might have removed them, and so far severed them from the property. Upon that ground it is that, without saying anything about underlease, as we have not got to consider that question now, I apprehend that a mortgage or assignment out and out of all a leaseholder's interest in the property itself, as distinguished from the fixtures, carries with it also the interest in the fixtures attached to the property, although those fixtures might be subject to the right of removal if the mortgage had not been executed by the party entitled to the lease. I mention that because it appears to me to cover the question of any fixtures that may have been added subsequently to the memorandum of deposit by the mortgagor in this instance. If subsequently to the memorandum of deposit, he had attached other chattels to the property, the mortgagee of the lease stood in the same position as his mortgagor, and those things when attached to the freehold passed during the interest that still remained in the lease.

"Therefore, the mortgage would attach to that, and the mortgagee would at any time during the lease have the benefit which his mortgagor had of removing those chattels that first attached anterior to his mortgage, and also subsequently attached posterior to his mortgage." (Per Hatherley, L.J., in *Meux* v. *Jacob,* 44 L. J. Ch. 481).

The general rule as to the implied permission given by a landlord to a tenant to remove fixtures does not apply as between mortgagor and mortgagee. The mortgagor is entitled to all fixtures which may be on the land whether they are placed

there before or after the mortgage, whether the mortgage be a mortgage of leaseholds or freeholds or be legal or equitable, and therefore, the right of the mortgagor attaches to chattels fixed to the mortgaged premises, unless there be some agreement, either express or implied, which limits this right of the mortgagor. The rule is just as applicable when a hire purchase agreement follows the mortgage as when it precedes it.

In *Hobson* v. *Gorringe,* [1897] 1 Ch. 182, it would appear that it was the opinion of the Court that if the mortgagee had had notice of the hire agreement he would have been bound by it, and would not have been allowed to retain the chattels as against their vendor, but that being without notice of the agreement he was entitled on taking possession to retain the chattels.

The cases of *Re Morrison,* 83 L. J. Ch. 129, and *Re Allen & Sons,* 76 L. J. Ch. 362; [1904] 1 Ch. 575, must be noticed. In the former case a purchaser under a hire purchase agreement affixed the purchased chattels to his premises, and then mortgaged the premises by deposit. The purchaser made default under his agreement; the vendor demanded redelivery of the chattels. Parker, J., held that the bank, being an equitable mortgagee, took subject to the hire purchase agreement; that the hire purchase agreement created an equitable interest by which a subsequent purchaser who had not the legal estate was bound, and that the interest of the bank under its mortgage was postponed to the interest of the vendors of the machinery under the hire purchase agreement; in other words that

the right to remove the chattels fixed to the freehold was equivalent to an interest in land, and that on the ordinary principal, the owner of the prior equitable interest had priority.

This principle was approved in the latter case, where it was held that debenture holders of a company, without notice of a prior hire purchase agreement for machinery, should be postponed to the vendors of the machinery, and that such vendors could therefore enter upon the premises and remove the machinery notwithstanding the appointment of a receiver.

It is supposed that the application of *Re Allan* to Torrens mortgages may not be very direct, inasmuch as a mortgagee under such mortgages, although he does not take the legal estate, yet takes a legal interest.

The mortgagee not in possession will not be entitled to an injunction to restrain the removal of such fixtures, or to obtain damages for the removal, unless his security is thereby rendered insufficient. Per Farwell, L.J. (*Ellis* v. *Glover, supra,* and *D'Augigney* v. *Brunswicke Balke Collender Co., supra*).

It seems in the latter case that the principles applicable to a legal mortgage in fee are also applicable to a mortgage under the Torrens system, as far as the right of possession goes. For it seems to have been assumed that a license to fix and remove the fixtures could have been implied from the fact that the mortgagor remained in possession.

CHAPTER XXVII.

Discharge of Mortgage.

In Alberta, discharge of a statutory mortgage is provided for by sections 63 and 71, and in Saskatchewan by section 94, and in Manitoba by section 112 of the respective Land Titles Act. These sections follow:—

As amended 1911-12, c. 4, 15 (15) (Alta., s. 63).

Upon the production of any mortgage or incumbrance having endorsed thereon or attached thereto a receipt or acknowledgment in the Form I. in the schedule to this Act, signed by the mortgagee or incumbrancee, or where it is stated in the mortgage or incumbrance that the money has been advanced on joint account by the surviving mortgagee or incumbrancee and proved by the affidavit of an attesting witness discharging the whole or any part of the land comprised in such instrument from the whole or any part of the principal sum or annuity secured thereby, or upon proof being made to the satisfaction of a Judge of the payment of all or part of the moneys due on any mortgage or incumbrance, and the production to the Registrar of a certificate signed by the Judge to that effect, or upon the production of a receipt or acknowledgment in the said Form I. accompanied by evidence satisfactory to the Registrar of the loss or destruction of the mortgage or incumbrance the Registrar shall thereupon make an entry on the certificate of title, noting that such mortgage or incumbrance is discharged, as aforesaid, as the

case requires, and upon such entry being so made, the land or the estate or interest in the land or the portion of the land mentioned or referred to in such endorsement as aforesaid, shall cease to be subject to or liable for such principal sum or annuity, or as the case may be, for the part thereof mentioned in such entry as discharged.

As amended 1911-12, c. 4, 15 (16) (Alta., s. 71).

In every case where land is subject to a mortgage or incumbrance signed by the owner, the duplicate certificate of title shall be deposited with the Registrar, who shall retain the same on behalf of all persons interested in the land mentioned in such certificate. The Registrar shall, if desired, furnish to the owner of such mortgage or incumbrance a certificate of charge in Form G.G. hereto, and before any instrument dealing with or discharging the said mortgage or incumbrance is registered, except in the case provided by section 65 of this Act, said certificate of charge shall be delivered up to the Registrar to be cancelled.

Provided, however, that the Registrar may dispense with such production upon satisfactory evidence being produced of the loss or destruction of any such certificate.

(Man., s. 112).

Upon the production of any memorandum of discharge of mortgage or incumbrance duly executed, discharging the whole or part of such mortgage or incumbrance or the whole or part of the land comprised in such mortgage or incumbrance from the moneys thereby secured, the District Registrar shall make an entry in the register, noting

that such mortgage or incumbrance is discharged wholly or partially, or that part of the land is discharged as aforesaid, as the case may require, and upon such entry being made, such mortgage or incumbrance shall be released to the extent named in such memorandum of discharge.

(Sask., s. 94).

Upon the production of any memorandum of discharge of mortgage or incumbrance duly executed and attested, discharging the whole or part of such mortgage or incumbrance from the moneys thereby secured, or the whole or part of the land comprised in such mortgage or incumbrance, or on proof being made to the satisfaction of the Judge of the payment of all or part of the money due on any mortgage or incumbrance, and the production to the Registrar of a certificate signed by the Judge to that effect, the Registrar shall make an entry on the register noting that such mortgage or incumbrance is discharged wholly or partially, or that part of the land is discharged as aforesaid, as the case may require. Upon such entry being so made the land or the estate or interest in the land or the portion of the land mentioned or referred to in such endorsement as aforesaid shall cease to be subject to or liable for such principal sum or annuity, or as the case may be, for the part thereof mentioned in such entry as discharged.

In Alberta, where a mortgagor is entitled to redeem he shall on payment have power to require the mortgagee, instead of giving a discharge of the mortgage, to transfer the property to any third party as the mortgagor directs, and the mortgagee

is bound to so transfer the mortgage (Land Titles Act, Alberta, s. 62 (17)).

A similar provision occurs in the Saskatchewan Act, section 93 (9).

It would appear from these enactments that the mortgagor has no right to insist on a transfer of the security to himself, instead of a statutory discharge, as the transfer is directed to be made to any third party. It is presumed, therefore, that where a second mortgagee pays off a prior mortgagee, he is only entitled to a statutory discharge, at any rate, the Acts provide no machinery by which the second mortgagee can avail himself of the prior mortgage to recover the money he has paid.

It might here be noted that payments made by a mortgagor, who has had no notice of the transfer of a mortgage, to the original mortgagee subsequently in the transfer, are to be considered as payments in discharge of the debt (*Nioa* v. *Bell,* 27 V. L. R. 82).

Where the mortgagee is absent from the province, payment may be made to the Provincial Treasurer, in Manitoba, section 125, and in Saskatchewan (sections 96 and 97), and Alberta (section 65), a Judge may direct payment to be made to a chartered bank, and the Registrar on presentation of the Judge's order and the receipt of the manager of the bank, shall make a memorandum of discharge of the mortgage.

It seems doubtful as to whether the registration of the discharge puts an end to the mortgagor's

covenant in the mortgage, but there is no doubt that until actual registration of the discharge the rights and powers of the mortgagee remain (see *Taylor* v. *Wolfe,* 18 V. L. R. 727).

It has been held in New Zealand (*Staples* v. *Mackay,* 11 N. Z. L. R. 258) that the registration does *ipso facto* put an end to the mortgagor's covenants. In that case the mortgage given by a hotelkeeper of his lease contained a covenant that the mortgagor would at all times during the continuance of the lease purchase from the mortgagee all colonial ale and stout, etc., at any time during the continuance of the lease, used, consumed or sold on the premises, and it was held that the covenant ceased to be binding upon the payment of the principal and interest secured by the mortgage, and that the mortgagor was entitled to an unqualified release of the mortgage, although the term of the lease had not then expired.

It has, however, been held in *Bell* v. *Rowe,* 26 V. L. R. 523, that the registration of the discharge does not *ipso facto* put an end to the mortgagor's covenants in the mortgage, and this probably is a correct statement of the law, inasmuch as, on the ordinary principles forbidding a clog against the equity of redemption, the covenant tieing the beer house would come to an end in any event upon repayment of the mortgage moneys.

It would appear that the provisions as to discharge require that it should be given by a registered mortgagee, and therefore, an executor prior to registration would be unable to give a valid discharge (*Payne* v. *Rex,* 26 V. L. R. at 753, 762).

A mortgagee must execute a release upon payment of his principal and interest, and a mortgagee refusing so to do is liable to pay the costs of an action for redemption (*Staples* v. *Mackay, supra*).

A mortgage under the Act, although subsequently discharged, is not sufficient proof of the exact amount alleged to have been paid as the consideration of the mortgage (*Hayes* v. *Wilson,* 6 A. L. T. 249).

It should be noticed that on the same principle it was held in *Flanagan* v. *Bladen,* 1 A. L. R. 62, that a transferee was not estopped from relying on the real facts and showing that the consideration for the transfer was not fully stated in the instrument; so also it was held in *Kelly* v. *Fuller,* 1 S. A. L. R. 15, that a registered transfer did not operate as an estoppel so as to prevent a vendor from showing that the moneys acknowledged therein to have been paid, had not been in fact paid. This decision has, however, been doubted in *Sinclair* v. *Gumpertz,* 15 W. N. N. S. W. 125.

The Australian Statutes nearly all provide that the effect of registration is that the instrument when registered created the same obligations as if the same had been sealed and delivered, or make some similar provision.

It might be noticed that none of the Acts make any provision as to the removal of the entry of a mortgage, where the right of the mortgagee has become barred by the Statute of Limitations. It was decided in New Zealand that in such cases the mortgagee is bound to give a proper discharge, but

that decision has not met with entire approval (*Shirley* v. *Tapper,* 23 N. Z. L. R. 849; *Re Campbell,* 11 Gaz. L. R. 760).

A mortgagor after default is liable to bear the costs of registering a transmission of the mortgage, so as to receive a proper discharge (*Ellis* v. *Fenton* (Tas.), May 22nd, 1895, per Dobson, C.J., applying *King* v. *Smith,* 6 Hare 473, cited by Canaway, p. 100).

CHAPTER XXVIII.

Limitation of Action—Remedy Against Land.

An action of ejectment, or an action of foreclosure, cannot be brought after the expiration of twelve years from the last payment of any part of the principal money or interest, or, where there has been no such payment, from the date when the action could first have been taken (3 & 4 Wm. IV., c. 27, s. 14; 7 Wm. IV. and 1 Vict. c. 28, and 37 & 38 Vict. c. 55, ss. 1 & 9).

An acknowledgment in writing of the title of the mortgagee, given by the mortgagor to the mortgagee or his agent, causes the period to run from the date of the acknowledgment, provided such acknowledgment is given prior to the claim having become unenforceable by action through lapse of time (*In re Alison,* 11 C. D. 284; *Sanders* v. *Sanders,* 19 C. D. 373, and *Kibble* v. *Fairthorne,* [1895] 1 Ch. 219).

The actions for ejectment or foreclosure are barred, even when the debt has not been barred (*Kibble* v. *Fairthorne,* [1895] 1 Ch. 219.)

The making of an order for foreclosure vests in the mortgagee a new right to the estate, for the possession of which he may sue within twelve years from the date of the order (*Pugh* v. *Heath,* 7 A. C. 235).

The right of the mortgagee to bring an action within twelve years is not ousted by the fact that

a stranger has acquired a title under the Statute of Limitations as against the mortgagor (*Ludbrook* v. *Ludbrook,* [1901] 2 K. B. 96), though in *Thornton* v. *France,* [1897] 2 Q. B. 143, where the stranger was in possession adversely to the mortgagor at the date of the mortgage, it was held that the mortgagee was barred. See, however, *Doe d. Palmer* v. *Eyre,* 17 Q. B. 366; *Doe d. Baddeley* v. *Massey,* 17 Q. B. 373, and *Cameron* v. *Walker,* 19 O. R. 212.

In case of concealed fraud, in some way imputable to the person invoking the aid of the statute, the period runs from the discovery of the fraud, or from the time when it might with reasonable diligence have been discovered, except as against *bona fide* purchasers for value (3 & 4 Wm. IV. c. 27, s. 26, and *Thorne* v. *Heard,* [1895] A. C. 495).

Relief may, however, be refused to persons whose claims are not barred by the statute, under the equitable doctrine of acquiescence (3 & 4 Wm. IV. c. 27, s. 27).

It has been held that this section applies to foreclosure actions but not to actions for raising by sale or mortgage of the land a sum of money charged thereon (*Wrixon* v. *Vize,* 3 Dr. & War. 104; *Trust and Loan Co.* v. *Stevenson,* 20 O. A. R. 66; *Barwick* v *Barwick,* 21 Gr. 39, and *Re Owen,* [1894] 3 Ch. 220).

In foreclosure actions the time dates from breach of the condition contained in the mortgage deed for repayment of the principal. (See *Wrixon*

v. *Vize, supra; Heath* v. *Pugh,* 7 A. C. 235; 6 Q. B. D. 345, and *Kibble* v. *Fairthorne,* [1895] 1 Ch. 219), and ceases to run when the writ is issued in an action for foreclosure (*Re Turner,* 43 W. R. 153, and *Williams* v. *Morgan,* [1906] 1 Ch. 804).

When the mortgage is payable on demand, time runs from the date of the mortgage, and no demand is necessary (*Brown* v. *Brown,* [1893] 2 Ch. 300).

The payment which causes the statute to cease running must be a payment made on account of principal or interest, and if not professedly made on such account, it cannot be ratified by the mortgagor. Payment of rent by a tenant of the mortgaged premises cannot be ratified by the mortgagor (*Harlock* v. *Ashberry,* 19 C. D. 539). It is not necessary, however, that the payment should be made by the party sought to be charged himself, but it cannot be made by a stranger, as such payment would only amount to a voluntary present to the creditor (*Chinnery* v. *Evans,* 11 H. L. C. 115; *Harlock* v. *Ashberry, supra,* and *Lewin* v. *Wilson,* 11 A. C. 639), and must be made to the person entitled to receive the money as mortgagee (*Barclay* v. *Owen,* 60 L. T. 220).

Upon the expiration of the statutory period for making an entry or bringing a suit, the title of the mortgagee is extinguished (*Dawkins* v. *Penrhyn,* 4 A. C. 51).

The mere fact that the land is in possession of a prior mortgagee does not extend the running of

the statute against the subsequent mortgagee (*S. Johnson & Sons* v. *Brock,* [1907] 2 Ch. 533).

The periods of disability arising from infancy (coverture), idiocy, lunacy or unsoundness of mind are to be excepted from the period leading to extinguishment of the action (37 & 38 Vict. c. 57, ss. 3, 4 and 5).

The exception of coverture is of course no longer operative.

CHAPTER XXIX.

LIMITATION OF ACTION—REDEMPTION.

An action for redemption cannot be brought after the expiration of twelve years next after the time at which a mortgagee has obtained possession or receipt of the profits of the mortgaged land, unless in the meantime an acknowledgment of the title of the mortgagor has been given.

Possession or receipt of profits will include the case of a mortgagee of wild lands, who has paid the taxes thereon (*Cowderoy* v. *Kirby,* P. C. 2 W. W. R. 723), and receipt of rent by the mortgagee from a tenant in possession (*Ward* v. *Carttar,* 1 Eq. 29, and *Marwick* v. *Hardingham,* 15 C. D. 339).

If an acknowledgment in writing of the title of the mortgagor to the land, or of his right to redeem, is given by the mortgagee or a person claiming through him to the mortgagor or his agent, the period dates from the acknowledgment (37 & 38 Vict. c. 57, s. 7).

An acknowledgment subsequent to the completion of the period will not revive the mortgagor's title (*Sanders* v. *Sanders,* 19 C. D. 373).

An acknowledgment given by the agent of the mortgagee is insufficient (*Richardson* v. *Younge,* 6 Ch. App. 478), as is an acknowledgment given to a third person, *i.e.,* not to the mortgagor or his agent (*Batchelor* v. *Middleton,* 6 H. 75, at 83), an agent including any person who has acted as or

been treated by the person making the acknowledgment as such (*Trulock* v. *Robey,* 12 Sim. 402).

An acknowledgment by a person entitled jointly has no effect (*Richardson* v. *Younge, supra*).

In order that the statute may operate there must be, not only a going out of possession on the part of the owner, but also actual exclusive possession for the statutory period and an actual, constant and visible possession by some one else (*Smith* v. *Lloyd,* 9 Ex. 562; *Agency Co.* v. *Short,* 13 App. Cas. 793 P. C.; *Gibson* v. *Wise,* 35 W. R. 409; *Bucknam* v. *Stewart,* 11 Man. L. R. 625; *McConaghy* v. *Denmark,* 4 S. C. R. 609; *Campbell* v. *Imperial Loan Co.,* 8 W. L. R. 502; *Delaney* v. *C. P. R.,* 21 O. R. 11, and *Creamer* v. *Gooderham,* 3 W. W. R. 950, and 6 W. W. R. 250).

Where neither the mortgagor nor the mortgagee has been in actual possession since the date of default under a mortgage, the mortgagee conserves his right to sell or foreclose, and the mortgagor conserves his right to redeem (*Creamer* v. *Gooderham, supra*).

A mortgagee of wild lands, who for over twenty years before the institution of a suit for its redemption has paid the taxes upon it to the knowledge and with the consent of the mortgagor, will be held to be in possession of it during that time, within the meaning of section 40 of the Statute of Limitations (B.C.), which provides that the mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage, but within

twenty years next after the time at which the mortgagee obtained such possession or receipt (*Cowderoy* v. *Kirby,* P. C. 2 W. W. R. 723).

Possession must be considered in every case with reference to the peculiar circumstances, the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow, with due regard to his own interest; all these things greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of possession (*The Lord Advocate* v. *Lord Lovett,* 5 A. C. 217).

In Manitoba (s. 83), and Saskatchewan, s. 61 b, no title adverse to or in derogation of the title of the registered owner can be acquired by possession.

CHAPTER XXX.

Limitation of Action—Recovery of Mortgage Debt.

No action, suit or other proceeding can be brought at law or in equity to recover any mortgage debt except within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent to a person entitled thereto, or his agent, and in such case no such action or suit or proceeding shall be brought, but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments. (The Real Property Limitation Act, 1874, s. 8).

If the mortgage debt is a simple contract debt, the personal action will be barred at the expiration of six years (*Barnes* v. *Glenton,* [1899] 1 Q. B. 885; *Hodges* v. *Croydon Canal Co.,* 3 B. 86, and *Wiley* v. *Ledyard,* 10 P. R. 182).

Section 8 of the Real Property Limitation Act, 1874, governs not only the remedy against the land, but also the personal remedy against the mortgagor on the covenant in the mortgage deed, or on a collateral bond given by him to secure the mortgage

debt (*Doe* v. *Williams,* 5 Ad. & E. 291, 296; *Sutton* v. *Sutton,* 22 Ch. D. 511; *Fearnside* v. *Flint,* 22 Ch. D. 579; *In re England,* [1895] 2 Ch. 820). Similarly section 1 of the Act of 1874 governs not only the remedy against the land, but also that on the personal covenant (*Shaw* v. *Crompton,* [1910] 2 K. B. 370). See also as to actions against a surety, *Re Frisby,* 43 C. D. 106, and *Re Powers,* 30 C. D. 291; and see *contra McDonald* v. *Elliott,* 12 O. R. 98; *Macdonald* v. *McDonald,* 11 O. R. 187, and *Allan* v. *McTavish,* 2 O. A. R. 278.

Where the mortgage comprises both land and pure personalty, the remedy against the pure personalty is lost as soon as the remedy against the land and the mortgagor is lost under the Real Property Limitation Act (*Charter* v. *Watson,* [1899] 1 Ch. 175), contrary to the rule where the mortgage is of pure personalty only. (See *London & Midland Bank* v. *Mitchell,* [1899] 2 Ch. 161).

A payment which is made less than twelve years before the action is brought, but more than twelve years after the cause of action has accrued, is a payment sufficient to stop the running of the Act.

Any person under a legal incapacity, *e.g.,* an infant or lunatic person, is not capable of giving a discharge within the meaning of the Act (*Pigott* v. *Jefferson,* 12 Sim. 26). The payment may be made by an agent (*Bradshaw* v. *Widdrington,* [1902] 2 Ch. 430).

Payment by any person liable to pay will stop the running of the time (*In re Frisby,* 43 C. D. 106), but payment by a stranger has not that effect

(*Roddam* v. *Morley,* 1 DeG. & J. 1, and *Pears* v. *Laing,* 12 Eq. 41).

Where two portions of land have been mortgaged together, payments made by the mortgagor who has sold the equity of redemption in one of the portions, keeps the debt alive as against the purchaser of the sold portion (*Chinnery* v. *Evans,* 11 H. L. C. 115, and *Hornsey Local Board* v. *Monarch Building Society,* 24 Q. B. D. 1).

Time does not run where the same hand has to pay and to receive. (See *In re Drax,* [1903] 1 Ch. 781).

An acknowledgment in a will, and an admission of indebtedness in the balance sheet of a bankrupt have been held sufficient to take the debt out of the statute (*Millington* v. *Thompson,* 3 I. Ch. R. 236; *Barrett* v. *Birmingham,* 4 I. Eq. R. 537), but *quære* as to a statutory declaration in lunacy proceedings. (Per Swinfen-Eady, J., in *Hervey* v. *Wynn,* 22 T. L. R. 93).

The amount of the debt need not be stated in the acknowledgment, and its identity may be established by parol evidence (*St. John* v. *Broughton,* 9 Sim. 219; *Jortin* v. *S.-E. Railway Co.,* 6 DeG. M. & G. 270; *Hanan* v. *Power,* 8 I. L. R. 505, and *Dugdale* v. *Vize,* 5 I. L. R. 568).

Where a mortgagee of land under the Transfer of Land (Victoria) Act, 1890, had entered into possession of the land, and was in receipt of the rents and profits thereof, his power of sale under the mortgage was held not to be affected by the fact that his right to recover the mortgage money was

barred by section 47 of the Real Property Act, 1890, inasmuch as the words "or other proceedings," in that are to be read as *ejusdem generis* with the preceding words, "action or suit," and do not include the exercise of a mortgagee's power of sale (*In re Australian Deposit & Mortgage Bank, Ltd.,* 1907, V. L. R. 348).

[Note that in Manitoba under the Real Property Limitation Act, the twelve years prescribed by the English statutes is a ten-year period, in so far as any limitation is imposed].

CHAPTER XXXI.

Limitation of Action—Arrears of Interest.

No arrears of interest in respect of any sum of money charged upon or payable out of any land can be recovered by any distress, action or suit, but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was due or his agent (The Real Property Limitation Act, 1833, section 42, The Real Property Limitation Act (Man.) section 18).

R. S. M. c. 100.

In a foreclosure action only six years of interest can be claimed, even though the mortgagor has covenanted, or entered into a collateral bond for payment of the mortgage money (*Hunter* v. *Nockolds,* 1 M. & G. 640; *McMicking* v. *Gibbons,* 24 O. A. R. 586, and note that *Du Vigier* v. *Lee,* 2 H. 326, was overruled by the first mentioned case); but if the action be brought on a covenant or bond only, the mortgagee can recover twenty (or perhaps only twelve: see *Sutton* v. *Sutton,* 22 C. D. 511) years arrears of interest by suing under section 3 of the Civil Procedure Act, 1833 (*Strachan* v. *Thomas,* 12 Ad. & E. 536, and *Round* v. *Bell,* 31 L. J. Ch. 127).

In a redemption action, however, the mortgagor is compelled to pay all arrears of interest (*Dingle* v. *Coppen,* [1899] 1 Ch. 726, but see *McMicking* v. *Gibbons,* 24 O. A. R. 586), and the

mortgagee is entitled to retain upon sale of the mortgaged property all arrears of interest due (*Edmunds* v. *Waugh,* 1 Eq. 418; *Re Lloyd,* [1903] 1 Ch. 385; *Ford* v. *Allen,* 15 Gr. 565, and *In re Stead's Mortgaged Estates,* 2 C. D. 713).

An acknowledgment by a mortgagor does not enable a first mortgagee to recover more than six years of interest as against a second mortgagee (*Bolding* v. *Lane,* 1 DeG. J. & S. 122).

Part payment of an instalment of interest does not prevent the statute running as to the balance (*Astbury* v. *Astbury,* [1898] 2 Ch. 111).

Where the claim is to redeem a mortgagee in possession, or for arrears of interest, there is no exception for disabilities, *e.g.,* infancy and lunacy (*Kinsman* v. *Rouse,* 17 C. D. 104, and *Forster* v. *Patterson,* 17 C. D. 132), these actions not being suits to recover land within the meaning of the Act.

Where a prior mortgagee has been in possession within one year from action brought by a subsequent mortgagee, the latter may recover (R. P. L. Act, s. 42; The Real Property Limitation Act (Man.), s. 19) for the whole period of the former's possession.

The acknowledgment need not amount to a promise to pay (*Moodie* v. *Bannister,* 4 Drew 432), should be made to the person entitled to receive the money (*Holland* v. *Clarke,* 1 Y. & C. Ch. Cas. 151, but see *Forsyth* v. *Bristowe,* 8 Ex. 716), and will revive the debt, although made after the remedy has been barred (*Moodie* v. *Bannister,* 4 Drew 432).

CHAPTER XXXII.

PRESCRIPTIVE TITLES.

The mere fact that no machinery is provided in the statutes for altering the register of land titles in accordance with rights acquired by mere lapse of time will not prevent the Court from adjudicating on the rights of litigants and directing that the register be altered accordingly. *Re Allen,* 22 V. L. R. 24, and *Re Tanner,* 5 N. Z. S. C. 107; Hogg, p. 963).

This view has not been followed in Alberta and Saskatchewan, where it has been held that an occupier of land, who has satisfied the requirements of the Real Property Limitation Act of 1874, as to possession for twelve years, acquires a title which cannot be attacked by the registered owner, and is entitled to a declaration that he is owner in fee simple of the lands by virtue of the possession for the statutory period, but is not entitled to a cancellation of the existing certificate of title and an issue of a new certificate to himself (*Wallace* v. *Potter,* 4 W. W. R. 738). In *Bradshaw* v. *Patterson,* 18 W. L. R. 402, Lamont, J., decided that the plaintiff had acquired a possessory title to land not then under the Act and expressed himself as being unable to see why she should not, upon a proper application to the Registrar, have the land brought under the Act and a certificate of title issued to her. This case was based on a decision of Stuart, J. (*Re Anderton,* 8 W. L. R. 319). See also *Harris* v. *Keith,* 16 W. L. R. 433.

In view of the opinion expressed in *Loke Yew* v. *Port Swettenham Rubber Co.*, [1913] A. C. 491, as to the duty of the Court to direct the rectification of the register, there seems to be now no reason why the old certificate of title should not be cancelled and a new one issued to a person with a possessory title.

In Manitoba it is expressly provided by section 83 of the Real Property Act, that after land has been brought under the Act no title thereto adverse or in derogation to the title of the registered owner shall be acquired by any length of possession merely. As to Sask., see 61 (b), a similar section.

By chapter 100 of the Revised Statutes of Manitoba, 1902, s. 24 (3), it is provided that in so far as any limitation is imposed by the Act, on the rights, remedies or powers under mortgages, the same shall be held not to apply to mortgagees or encumbrancees in mortgages or incumbrances heretofore or hereafter made under "The Real Property Act," except as to the liability under covenants for payment of any moneys secured thereby. This sub-section shall be retroactive (1908), 7 & 8 Edw. VII. c. 52, s. 6.

The Land Transfer Act of New Zealand, 1908, section 61, provides that after land has become subject to the Act no title thereto or to any right, privilege or easement in, upon or over the same shall be acquired by possession or use adversely to or in derogation of the title of the registered proprietor,

Under this section it was held that the word "land" included any estate or interest in land, and the words "registered proprietor" included the

owner of an estate or interest as mortgagee of the land, and that accordingly a mortgagee's rights over the land under the Act cannot be barred by any statute of limitations (*Campbell* v. *District Land Registrar,* 29 N. Z. L. R. 332, overruling *Shirley* v. *Tupper,* 23 N. Z. L. R. 849).

In *In re Allen,* 22 V. L. R. 24, the registered owner allowed another person to occupy the land for the statutory period required by the Limitation Acts and the occupant applied to have the land brought under the system. It was held that this could not be done, and that the proper course for the applicant to take was to have himself placed on the register by means of a transfer or a vesting order.

In *In re Bryman,* 9 Q. L. J. (N.C.) 93, Bryman sold land to Sharp, and delivered the certificate of title to him without executing a transfer. Sharp handed the certificate of title to a purchaser, but executed no transfer. Sharp then died and Bryman disappeared. The applicant purchaser remained in possession for more than 20 years, but was refused a vesting order, the Judge being of opinion that the Statute of Limitations did not run against a registered proprietor.

In *Wadham* v. *Buttle,* 13 S. A. L. R. 1, Gwynne, J., said: "I am utterly ignorant as to what the Statute of Limitations has to do with the merits of the case at all. The Real Property Act makes a certificate of title absolute and indefeasible evidence in any Court of law or equity here; and in this case a person holding a certificate of title comes into Court to maintain an action of

ejectment. He produces the certificate and that is final and absolute evidence of his right to the land, unless the defendants are prepared to get rid of the certificate by showing that it was obtained by fraud. If they cannot get rid of it in this manner, they are bound by it, for it is absolute and indefeasible evidence, and no Court can refuse to receive it as such."

The nature of the estate gained by possession under the Statute of Limitations is explained by Cozens-Hardy, M.R., in *In re Atkinson and Horsell's Contract,* 81 L. J. Ch. 588:—

" The true view is that whenever you find a person in possession of property that possession is *prima facie* evidence of ownership in fee, and that *prima facie* evidence becomes absolute when once you have extinguished the right of every other person to challenge it. That is the effect of section 34 of the Real Property Limitation Act, 1833; and that explains how the person who has been in possession for more than the statutory period does get an absolute legal estate in the fee, because there is nobody who can challenge the presumption that his possession of the property gives."

CHAPTER XXXIII.

INTEREST.

Even where the mortgage contains no provision as to interest, interest will yet be allowed the mortgagee seeking foreclosure. (See *In re Kerr's Policy,* 8 Eq. 331). There is no longer any reason why compound interest should not be stipulated for by mortgage deed (*Clarkson* v. *Henderson,* 14 C. D. 348, and *McLaren* v. *Miller,* 20 Gr. 637, but see provisions of Interest Act, *infra*), but in the absence of contract, express or implied, simple interest only is chargeable (*Daniell* v. *Sinclair,* 6 A. C. 181).

It has been held, however, that compound interest is always incidental to the relationship between banker and customer, so long as the same subsists (see *Fergusson* v. *Fyfe,* 8 Cl. & F. 121; *Crosskill* v. *Bower,* 32 B. 86; *Williamson* v. *Williamson,* 7 Eq. 542; *Barfield* v. *Loughboro,* 8 Ch. 1; *National Bank* v. *United Hand-in-Hand Co.,* 4 A. C. 391).

A proper tender always stops the running of interest on the mortgage debt, provided that the mortgagor keeps the money ready to pay over to the mortgagee (*Kinnaird* v. *Trollope,* 42 C. D. 610, and *Bank of N. S. W.* v. *O'Connor,* 14 A. C. 273).

A mortgagee may charge interest upon all sums which he is expressly or impliedly authorized to add to his security, *e.g.,* moneys paid in entire or partial discharge of prior incumbrances or for improvements, insurance premiums or taxes (*Quarrell* v. *Beckford,* 1 Madd. 269, and *McMaster* v. *Hector,* 8 C. L. J. 284).

It is provided by the Act respecting interest (R. S. C. 1906, c. 120) as follows:

2. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon.

3. Whenever interest is payable by the agreement of parties, or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be five per centum per annum.

6. Whenever any principal money or interest secured by mortgage of real estate is by the same made payable on the sinking fund plan or on any plan under which the payment of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money, and the rate of interest chargeable thereon, calculated yearly or half yearly, not in advance.

7. Whenever the rate of interest shown in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation, or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable on the principal money advanced, than the rate shown in such statement.

8. No fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted, on any arrears of principal or interest secured by

mortgage of real estate, which has the effect of increasing the charge on any such arrear beyond the rate of interest payable on principal money not in arrear, but nothing in this section contained shall have the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrear.

9. If any sum is paid on account of any interest, fine or penalty not chargeable, payable, or recoverable under the three sections last preceding, such sum may be recovered back or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal.

10. Whenever any principal money or interest secured by mortgage of real estate is not, under the terms of the mortgage, payable until a time more than five years after the mortgage, then if at any time after the expiration of such five years, any person liable to pay or entitled to redeem the mortgage tenders or pays to the person entitled to receive the money, the amount due for principal money and interest to the time of payment, as calculated under the provisions of the four sections last preceding, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage: Provided that nothing contained in this section shall apply to any mortgage upon real estate given by a joint stock company or other corporation, nor to any debenture issued by any such company or corporation, for the payment

of which security has been given by way of mortgage on real estate.

In *Colonial Investment Co.* v. *Borland,* 2 W. W. R. 960, Harvey, C.J., in delivering the judgment of the Court en banc, seems to suggest that a covenant may amount to a statement so as to comply with the provisions of the Interest Act.

In *Canadian Mortgage Investment Co.* v. *Baird,* 10 W. W. R. 1195, Beck, J., held that a statement in a mortgage, that it is declared and agreed between the mortgagor and the mortgagees, that the principal sum secured hereby is $1,300, and the rate of interest chargeable hereon and on all sums which may be added to the mortgage money hereunder, is 10 per cent. per annum as well after as before default, is a sufficient compliance with 66 of the Interest Act, the word statement in that section being used in the same sense as in " statement of claim," " statement of facts," " statement of affairs," which imports more than real figures, and the words, " not in advance," are not required to be in the statement, but constitute a prohibition on the mortgagee against calculating the interest in advance.

In *Canadian Mortgage Investment Co.* v. *Cameron,* 10 W. W. R. 959, the covenants in the mortgage were:

1. That he will pay the above sum of $1,400 and interest thereon, at the rate hereinafter specified, that is to say, in instalments of $179.90 half-yearly on the 24th days of June and December in each year until the whole of the said principal and the interest thereon is fully paid and satisfied, making

It is legal to insert a proviso for the reduction of the rate of interest if paid within the prescribed time, and such reduction of interest may be provided for even by a verbal agreement (*Milton* v. *Edgworth,* 5 Bro. P. C. 313; *Gregory* v. *Pilkington,* 8 De G. M. G. 616 C. A.); there may be a verbal agreement for a higher rate subsequent to the mortgage. See *Standard Trust Co.* v. *Hurst,* 6 W. W. R. 493; section 8 of Interest Act does not apply to such subsequent agreement.

An agreement for increasing the rate of interest on failure of punctual payment, is a penalty against which the Courts will relieve (*Holles* v. *Wise,* 2 Vern. 289; *Wallingford* v. *Mutual Soc.,* 5 A. C. 685; *Sparling* v. *Cunningham,* 4 W. L. R. 336, and *Nichols* v. *Maynard,* 3 Atk. 519).

Lord Hatherley in *Wallingford* v. *Mutual Soc., supra,* referred to this distinction as being extremely fine and nice, and Kay, J., in *Mainland* v. *Upjohn,* 41 C. D. 126, considers that a clause increasing the rate of interest in case of non-punctual payment is a stipulation for a collateral advantage, which it probably is, and not really a penalty—a penalty being a liability which is intended by the parties to be *in terrorem,* or a security merely, and which it would be unconscionable to enforce save by way of indemnity (see *Dunlop's Case,* [1915] A. C., p. 79, and see 32 L. Q. R., p. 426).

Where a mortgage provides for interest up to the date fixed for payment, but not beyond, a contract for the continuance of interest at the same rate, or any rate at all, cannot be implied, and

interest is given in such cases as damages for detention of the debt (*Cook* v. *Fowler,* 7 H. L. 27; *Re Roberts,* 14 C. D. 49, and *Goldstron* v. *Tallerman,* 18 Q. B. D. 1).

Where a mortgage deed provides for payment of interest after default, and then judgment on the covenant is obtained, the mortgage is as a rule merged in the judgment (see *Ex parte Fewings,* 25 C.D. 38; *Arbuthnot* v. *Bunsilall,* 62 L.T. 234; *Economic Life Assurance Soc.* v. *Usborne,* [1902] A. C. 47; *St. John* v. *Rykert,* 10 S. C. R. 278; *Powell* v. *Peck,* 15 O. A. R. 138; *European Central Railway Co.,* 4 C. D. 33; *Re Roberts,* 14 C. D. 49; *Popple* v. *Sylvester,* 22 C. D. 98; *Manitoba & N. W. Loan Co.* v. *Barker,* 8 Man. L. R. 296; *Freehold Loan Co.* v. *McLean,* 8 Man. L. R. 116, and *Credit Foncier* v. *Schultz,* 9 Man. L. R. 70).

Provisions in a mortgage contract that interest at a specified rate should be payable "until paid," "until payment in full" or "until repayment thereof," are not to be construed as provisions to pay interest after maturity (see cases *supra; Credit Foncier* v. *Schultz, supra,* is a case of an implied covenant to pay interest after maturity).

Lowry v. *Williams* (1895), 1 I. R. 274, contains a good summary of the law on this subject as follows:

In that case Walker, L. C., says: "Those cases appear to establish: 1. That if there is a covenant in a mortgage to pay a principal sum and interest at a contract rate on a named day, and no further covenant, a judgment recovered for the principal sum and interest to date merges the debt and

interest at 4 per cent. on the judgment is recoverable, even though property is assigned as security; (2) that if there is such a covenant as last mentioned, and also a covenant that if the principal sum remains unpaid after the day named, interest at a certain contract rate shall be paid, while the principal sum or any part thereof remains unpaid, and judgment is recovered for the principal sum and interest to date, there is nothing left for the subsequent covenant to pay interest to operate upon, as the covenant to pay the principal has been merged and gone, and therefore a claim or action on such subsequent covenant will fail; (3) but if such subsequent covenant is in the form of an obligation to pay interest at a contract rate while the principal money remains due on the security of the indenture or equivalent words, and property has been mortgaged or charged to secure the loan, and the claim is to realize the subsequent interest at the contract rate out of the security, then the subsequent covenant is independent, and must have full effect given to it, as against the property" (in this judgment O'Brien, C.J., Fitzgibbon, L.J., and Barry, L. J., concurred).

Fitzgibbon, L.J., said: "I confess that the distinction between the English cases is very fine; and I think that it would have been a more satisfactory principle to lay down that every covenant for the payment of interest upon a debt is 'subsidiary' to the covenant for payment of the principal, and that when the principal has passed into *rem judicatam,* no larger sum should be recoverable, for either principal or interest, than what

was recoverable under the judgment. Such a principle would be in accordance with the reasoning of Lord Bramwell in the *European Central Railway Co.;* and though *Popple* v. *Sylvester* was recognized in *Ex parte Fewings,* Lord Justice Fry was then a member of the Court of Appeal; and the other members of the Court distinguished rather than adopted his previous decision, which I find it difficult to reconcile with what seems to me to be a corollary from Lord Bramwell's dictum that ' there cannot be two debts '—namely that ' the sole debt between the parties ' cannot bear two rates of interest." The covenant in *Arbuthnot* v. *Bunsilall* does not clearly appear to me to be less 'subsidiary' than the covenant here; and I should prefer to follow Stirling, J., if I could do so, without disregarding *Popple* v. *Sylvester,* as recognized by the English Court of Appeal."

[Since the above chapter was put into type, it has been decided in the Supreme Court of Canada that the statements or covenants in *Canadian Mortgage Investment Co.* v. *Cameron, supra,* and *Stubbs* v. *Standard Reliance Mortgage Corporation, supra,* sufficiently complied with the requirements of the Interest Act. See [1917] 3 W. W. R. 395 and 402. See also *Standard Reliance Mortgage Corporation* v. *Cowie,* [1917] 3 W. W. R. 238.]

CHAPTER XXXIV.

MERGER.

The doctrine of merger is frequently referred to in the course of cases on the Torrens System Acts. It is thought that most of these cases are more properly cases of extinguishment than of merger.

Merger is defined as follows: In Blackstone, whenever a greater estate and a less coincide, and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or, in the law phrase is said to be merged, that is sunk or drowned in the greater: 2 Black Com. 177.

The requisites for merger to take place are:

(1) Two estates.

(2) Vested in the same person at the same time.

(3) The estates must be immediately expectant one upon the other.

(4) The expectant must be larger than the preceding particular estate (9 Enc. Laws of Eng. 193).

Equity would in every case interfere to preserve beneficial interests from being destroyed by the merger of two legal estates, regarding the matter as governed entirely by intention (see *Brandon* v. *Brandon,* 31 L. J. Ch. 47; *Capital & Counties Bank* v. *Rhodes,* [1903] 1 Ch. 631, and *Lea* v. *Thursby* [1904], 2 Ch. 57).

Questions relating to extinguishment of charges on the fee or other estates charged have nothing

to do with merger properly so-called, though they are often confused with it, and are often improperly included in the word. It may now be regarded as conclusively settled that (1) upon a charge and the estate charged coming to the same hands the charge will never be extinguished contrary to the express intention, of the party, and (2) that in the absence of expressed intention, the intention may be inferred from what would most have conduced to the parties benefited. Though there will never be an extinguishment contrary to the intention of the parties, yet special circumstances may exist to prevent him in equity from setting up the charge against a subsequent encumbrancer. (See Challis's Real Property, 3rd ed., p. 96).

As to extinguishment generally, see *Toulmin* v. *Steere,* 3 Mer. 210; *Evans* v. *Angel,* 5 C. D. 634; *Thorne* v. *Cann* [1895], A. C. 11; *Crosbie-Hill* v. *Sayer* [1908], 1 Ch. 866; *Phillips* v. *Guttridge,* 4 DeG. & J. 531; *Manx* v. *Whitely* [1911], 2 Ch. 448; [1912], 1 Ch. 735; 81 L. J. Ch. 457, C. A., and 83 L. J. Ch. 349, and *Forbes* v. *Moffat,* 18 V. 384.

It would appear that where a mortgage is discharged by the mortgagor, the mortgage debt is thereby extinguished, but where the mortgage is redeemed or discharged by a third party, and the effect of a merger of the debt would be to make a gift to the next incumbrancer or person interested at the expense of the party redeeming or discharging the mortgage, there is a presumption that the party redeeming the mortgage intended to keep alive the mortgage and it would be treated as still

subsisting for his benefit (*Toulmin* v. *Steere,* 3 Mer. 210; *Otter* v. *Lord Vaux,* 2 K. & J. 650; *Manx* v. *Whiteley* (1912), 1 Ch. 735, and on appeal Ch. 81 L. J. Ch. 457; *Burrell* v. *Egremont,* 7 B. 205; *Thorne* v. *Cann* [1895], A. C. 11, and *Liquidation Estates Co.* v. *Willoughby* [1898], A. C. 321).

There is a presumption in favour of merger when the absolute interest in a charge is united with the estate in fee simple in the land, there being no advantage in keeping the charge alive (*Forbes* v. *Moffatt,* 18 V. 384), but there is a presumption against merger when a tenant for life or other limited owner acquires or pays off a charge since the merger would operate as a gift to those in remainder (*Burrell* v. *Egremont,* 7 B. 205, at 232; *Pitt* v. *Pitt,* 22 B. 294, and *Gifford* v. *Fitzhardinge* [1899], 2 Ch. 32). These presumptions always yield to the intentions either expressed or implied, *e.g.,* where the non-merger would be for the benefit of the owner (see *Forbes* v. *Moffatt, supra,* but see also *Manx* v. *Whiteley,* upon appeal *supra*).

Even an express declaration will not keep the charge alive if there are circumstances pointing conclusively to merger (*Re Gibbon* [1909], 1 Ch. 367, and *Swabey* v. *Swabey,* 15 S. 106).

In *Reeves* v. *Konschur,* 10 W. L. R. 680; 2 Sask. L. R. 125, the defendant owned certain land subject to first and second mortgages and to an execution. The first mortgagee having commenced foreclosure proceedings, the execution creditor paid off the mortgage, took an assignment thereof and a transfer of the land, which she registered,

and also took an acknowledgment of indebtedness from the defendant. The Registrar issued to her a certificate of title, showing her to be the owner subject to the second mortgage, on the ground that the first was extinguished by the transfer to her. It was held that the intention must prevail and control the covenant implied between mortgagor and mortgagee for indemnity, and that the mortgage was not extinguished.

Semble, that where a lessee under the Land Transfer Act whose lease is subject to a registered mortgage acquires the fee simple of the land leased to him, it is the duty of the District Land Registrar, when the transfer of the fee simple is presented for registration, to indorse upon the certificate of title the fact that it is subject to the lease and the mortgage over the lease. Under these circumstances the lease does not merge in the freehold, and the legal doctrine of merger does not apply to land held under the Land Transfer Act.

The equitable rule that where a lessee who has mortgaged his lease acquires the freehold of the land, the mortgage over the lease is not destroyed applies to land held under the Land Transfer Act (*Beavan* v. *Dobson,* 26 N. Z. L. R. 69).

CHAPTER XXXV.

Notice and Fraud.

The sections of the various Land Titles Acts relating to fraud in so far as the registered owner is concerned are as follows:

The owner of land for which a certificate of title has been granted shall hold the same subject (in addition to the incidents implied by virtue of this Act) to such incumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title absolutely free from all other incumbrances, liens, estates or interests whatsoever except in case of fraud wherein he has participated or colluded (Alta., s. 42).

Every certificate of title hereafter or heretofore issued under this Act shall so long as the same remains in force and uncancelled be conclusive evidence at law and in equity as against His Majesty and all persons whomsoever that the person named in such certificate is entitled to the land described therein for the estate or interest therein specified, subject, however, to the right of any person to show that the land described in such certificate is subject to any of the exceptions or reservations mentioned in section 78 or 82, or to show fraud wherein the registered owner, mortgagee, or encumbrancer has participated or colluded and as against such registered owner, mortgagee or encumbrancee, but the onus of proving that such certificate is so sub-

ject or of proving such fraud, shall be upon the person alleging the same (Manitoba, s. 79).

In Saskatchewan the provision, section 65, is similar to that of section 42 of Alberta.

The provisions relating to the protection of a purchaser, etc., are as follows:

In Alberta, except in the case of fraud, no person contracting or dealing with, or taking, or proposing to take a transfer, mortgage, encumbrance, or lease from the owner of any land for which a certificate of title has been granted, shall be bound or concerned to inquire into, or ascertain the circumstances in, or the consideration for which the owner, or any previous owner of the land is, or was, registered, or to see to the application of the purchase money, or of any part thereof, nor shall he be affected by notice, direct, implied, or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding, and the knowledge that any trust, or unregistered interest is in existence shall not of itself be imputed as fraud (Alberta, s. 135).

In Manitoba, section 99 is very similar to section 135 of Alberta, except that it uses the general term "instrument," instead of "transfer," "mortgage," etc.

The Saskatchewan Act, section 162, is also similar to section 135 of the Alberta Act, except that it makes clear that the fraud which will affect the purchaser, etc., is his own fraud, which seems to be true in the other jurisdictions.

From these sections it is apparent that actual notice in itself will not amount to fraud. It is

true that in the sections relating to the protection of the owner, there is no proviso that knowledge of a prior interest is not in itself to be imputed as fraud, but it is thought that the general scheme of the Acts would import some such proviso.

The law as to the similar sections in Australia is laid down as follows in Hogg, p. 835:

"With regard to decisions on the sections relating to the conclusive effect of certificate of title, it has been held in some cases that the fraud there mentioned means actual or moral fraud, not merely constructive or legal fraud (see *Gregory* v. *Alger,* 19 V. L. R. 565; *Thomson* v. *Finlay,* 5 N. Z. S. C. 203, and *Lake* v. *Jones,* 15 V. L. R. 728).

"In other cases fraud has been said to include constructive, legal, and every kind of fraud (*Biggs* v. *McAllister,* 14 S. A. R. 86; *Saunders* v. *Cabot,* 4 N. Z. C. A. 19, and *Franklin* v. *Ind,* 17 S. A. R. 159).

"In other cases again, knowledge of other persons' rights and the deliberate acquisition of a registered title in the face of such knowledge has been held to be fraud which rendered voidable the certificate of title so obtained (*Davis* v. *Wekey,* 3 V. R. 1; *National Bank* v. *National Mortgage Co.,* 3 N. Z. S. C. 257; *Ogle* v. *Aedy,* 13 V. L. R. 461; *Finnoran* v. *Weir,* 5 N. Z. S. C. 280; *Bell* v. *Beckman,* 10 N. S. W. Eq. 251; *Kissick* v. *Black,* 10 N. Z. R. 519; *Loudon* v. *Morrison,* 14 N. Z. R. 245; *Locher* v. *Howlett,* 13 N. Z. R. 584; *Gilbert* v. *Bourne,* 6 Q. L. J. 270, and *Merrie* v. *MacKay,* 16 N. Z. R. 124), and voluntary ignorance is for this purpose the same

as knowledge (*Locher* v. *Howlett, supra,* and *Gilbert* v. *Bourne, supra*).

" But in none of these three classes of cases was there absent the element of intention to deprive another of just rights, which constitutes the essential characteristics of actual distinguished from legal fraud.

" In yet another class of cases the Courts have declined to infer fraud from the existence of facts which showed an intention to rely on the positive or legal title conferred by the statutes without any active steps being taken to deprive others of their rights (*Lake* v. *Jones,* 13 V. L. R. 728; *Arnold* v. *Walwork,* 20 N. S. W. 368; *Robertson* v. *Keith,* 1 V. R. 11; *Cooke* v. *Union Bank,* 14 N. S. W. Eq. 280, and *Oertel* v. *Hordern,* 2 S. R. (N.S.W.) 37)."

The foregoing extract from Mr. Hogg's valuable book represents his position at the end of the year 1904, but his more mature opinions are presented in an article in the Law Quarterly Review, No. 116, at p. 434, as follows:

" It will be submitted in the following part of this article that the legislative efforts to insist on the validity of registration in the face of notice should also be considered to have failed except as to mere constructive notice."

This conclusion is based on the decision (*Loke Yew* v. *Port Swettenham Rubber Co.*, 82 L. J. P. C. 89; [1913], A. C. 491, and it is thought is not fully borne out by that case.

Before giving reasons for this opinion, it would be well to consider the facts of that case.

The facts were: In 1894 the residents of Selangor granted three hundred and twenty-three acres to a certain Haji Mohamed Yusuf, and Yusuf disposed of portions of the land to cultivators by grants and perpetuities subject to an annual rent. The documents affecting these disposals were not registered, and at various times Loke Yew purchased some grants from their owners. In 1910 the Port Swettenham Rubber Co. formed the project of acquiring the land included in the grant to Yusuf with full knowledge of his various disposals thereof. Yusuf endeavoured to buy back his sub-grants, but Loke Yew refused to sell. When the deed of conveyance purporting to convey the original grant in its entirety was presented to Yusuf, he refused to sign the same without a document showing that he was not selling Loke Yew's land. The agent of the company asserted that he would purchase Loke Yew's interest, and signed and gave to Yusuf the following document: "I have purchased the land comprised in grant No. 675, etc., as regards Loke Yew and See Oh Kongsee's land which is included in the said grant; I shall have to make my own arrangements." The judgment of the Privy Council says: "Their Lordships have no doubt that the true conclusion to be drawn from the evidence is that the above statement of Mr. Glass to Yusuf was intended to be, and was a statement as to present intention as well as an undertaking with regard to the future, and that that statement was false, and fraudulently made for the purpose of inducing Yusuf to execute a conveyance which in form comprised the whole of the original

grant, and that but for such fraudulent statement that conveyance would not have been executed."

Later, the judgment runs: "Their Lordships, therefore, find that the formal transfer of all the rights under the original grant was obtained by the *deliberate fraud* of Mr Glass."

Later on, the judgment runs: "The conclusion to which their Lordships have come as to the transfer having been obtained by fraud brings the case within the exception, section 7, and is, therefore, a sufficient answer to these arguments. But their Lordships are of the opinion that for other reasons they are irrelevant, and beside the mark. They take no account of the power and duty of a Court to direct rectification of the register. So long as the rights of third parties are not implicated a wrongdoer cannot shelter himself under the registration as against the man who has suffered the wrong; indeed the duty of the Court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration, if the register be not rectified. Take for example the simple case of an agent who has purchased land on behalf of his principal, but has taken the conveyance in his own name, and in virtue thereof, claims the ownership of the land, whereas he is in truth a bare trustee for his principal. The Court can order him to do his duty just as much in a country where registration is compulsory as in any other country; and if that duty includes fresh entries in the register, or the correction of existing entries, it can order the necessary acts to be done accordingly. It may be

laid down as a principle of general application, that where the rights of third parties do not intervene, no person can better his position by doing that which it is not honest to do; and inasmuch as the registration of this absolute transfer of the whole of the original grants was not an honest act under the circumstances, it cannot better the position of the plaintiff as against the defendant, and they cannot rely on it as against him when seeking to so enforce rights which formally belong to them only by reason of their own fraud."

It must be remembered that the transfer was obtained from an unwilling transferor by a blameful contrivance, that is, the false and fraudulent statement as to a present fact, viz., the present intention of Mr. Glass to purchase the claim from Loke Yew, and also that the decision was also based upon the fact that in an illustration appended to section 3 of enactment No. 9 of 1903, *i.e.* The Specific Relief Enactment Act of the Malay States, the law is laid down to the following effect: "A. buys certain land with notice that B. has already contracted to buy it. A. is a trustee within the meaning of this enactment for B. of the land so bought."

Under such circumstances it cannot be said that the case expressly decides that actual notice necessarily amounts to fraud, and at any rate the principle involved or suggested in *Robinson* v. *Ford,* 25 W. L. R. 569; 5 W. W. R. 542; *Sydie* v. *Sask. Land & Development Co.,* 5 W. W. R. 194; 25 W. L. R. 570; *Rounsevell* v. *Ryan,* 1910, S. A. R. 67, and *Oertel* v. *Hordern,* 2 S. R. N. S. W. 37, is still true,

that is, the general principle that whether actual notice amounts to fraud or not is always a question of fact, a principle which involves the possible existence of a state of facts in which actual notice would not be fraud.

In the first mentioned case, *Robinson* v. *Ford,* it was held that though mere knowledge of the existence of an unregistered outstanding transfer does not necessarily imply fraud as against a party getting title and having such knowledge, yet where assignees of a mortgage know that the holder of the outstanding transfer is under the impression that the mortgage has been discharged, that the source of his impression was the bank with whom the mortgage was deposited, that the holder of the transfer was earnestly seeking for information as to the status of the mortgage, while they themselves leave the holder under his false impression, keep him in ignorance of foreclosure proceedings taken by them, and keep the Court in ignorance of his interest, such conduct is fraud within the meaning of the Land Titles Act, and any title obtained in such a way ought not to be allowed to stand.

In *Independent Lumber Co.* v. *Gardiner,* 13 W. L. R. 548, the Court, though considering the question, does not determine it, that is as to whether the acquiring of a registered mortgage of certain property with knowledge of a prior transfer of the same property, and knowledge that the registration of the mortgage would defeat the transfer would amount to fraud. Brown, J., in delivering the decision of the full Court, quotes, however, the

opinion of Hogg, as set out in his work on Ownership and Incumbrance of Registered Lands, at p. 151, to the following effect: "It is consistent both with good faith and the scheme of the system that other persons than the registered owners should be known to have interests in the land, not appearing on the face of the register, and to effect registration with the knowledge of the existence of such interest may be justifiable and proper. But to effect registration with the knowledge that another person is also taking steps to effect registration in respect to the same property could hardly under any circumstances be otherwise than dishonest and fraudulent."

In *Sydie* v. *Saskatchewan Land Co. supra,* Sydie bought from a certain company, of which Brown was secretary-treasurer, ten lots in Edmonton in a certain block 9. One of these lots having been sold, the company sent to Sydie two agreements of sale, one for nine lots in block 9 and another for another lot, lot 15, in block 5, which Sydie executed, and Brown signed as secretary-treasurer of the company. Upon Sydie's paying all that was due, the company sent him a transfer for 10 lots including 15 in block 15, instead of in block 5. Sydie noticed the mistake, which had probably been caused by a letter which he had written to the company giving them information as to the lots he had bought, such information being necessitated by the fact that the records had been accidentally destroyed by fire. Whilst Brown and the company knew the mistake which had been made, Brown, who had then severed his connection with the company,

bought lot 15 in block 5 from the company and registered his transfer.

It was held by Stuart, J., that the conduct of Brown amounted to fraud, in reliance upon *Syndicate Lyonnais du Klondike* v. *McGrade,* 36 S. C. R. 251, where it was held that a company having notice, not that there had in fact been a fraud, but that another person was claiming in an action that their vendor's certificate had been obtained by fraud, was not entitled to the protection of section 135. Stuart, J., quoted with approbation the remark of Richmond, J., in *National Bank* v. *National Mortgage & Agency Co.,* 3 N. Z. S. C. 257: "That it may be an act of downright dishonesty, knowingly to accept from the registered owner a transfer of property which he had no right to dispose of, and that it is enough to say on which side of a possible line of demarcation, the case falls without pretending to draw the actual line."

In *Rounsevell* v. *Ryan,* 1910, S. A. R. 67, Ryan had obtained from the owner of land a written agreement for a four-years' lease, and Rounsevell purchased the land knowing of this agreement, but being informed that it was a verbal one only, Rounsevell asked his vendor not to disclose the fact that he was buying the property, and the title was accepted expressly subject to this agreement for the lease, but no entry as to the lease was made upon the register. It was decided that Rounsevell was entitled to eject Ryan on the ground that he believed the agreement, being merely verbal, to be unenforceable, so that he could obtain a clear title by registering his transfer.

In *Oertel* v. *Hordern,* 237 S. R. (N. S. W.), Hordern purchased the land knowing that there was a tenant in occupation, and being informed shortly afterward that that tenant had a lease. Immediately before the completion of the sale, Oertel, the tenant, gave the defendant formal notice that he had a lease under seal for three years with an option of renewal for another two years, and that he intended to exercise such option. Defendant completed the purchase, took a transfer, and was registered. He then sought to eject Oertel, and Oertel in this case asked for an injunction on the ground that Hordern had been guilty of fraud within the meaning of the Acts.

The conclusion drawn by Hogg, on p. 440 of the article above referred to, is as follows:

"No cases, Australian or other, are referred to in the judgment of the Judicial Committee, but the decision and the grounds upon which it rests are quite inconsistent with the two Australian cases above mentioned (*Oertel* v. *Hordern,* and *Rounsevell* v. *Ryan*). It is submitted that these should now be regarded as overruled as well as *Cooke* v. *Union Bank,* 14 S. W. Eq. 280. The observations as to notice and fraud contained in *Robertson* v. *Keith,* 1 V. R. 11, and *Lake* v. *Jones,* 15 L. R. 728, would also in this view cease to be authoritative. These three cases are all relied on in *Oertel* v. *Hordern.*"

It is thought that a more accurate statement of the law of notice is as suggested above; that actual notice does not necessarily amount to fraud; it may be difficult to draw the line between the actual

notice that amounts to "fraud importing grave moral blame" within the meaning of *Battison* v. *Hobson* [1896], 2 Ch. 403, and that disregard of notice which might possibly show a low moral perception within the meaning of *Lake* v. *Jones,* 15 V. L. R. 728, where an endeavour by a registered proprietor and a purchaser from him to take advantage of a mistake, whereby land, though occupied by the defendant, was wrongly included in the certificate of title of the purchaser plaintiff, was held not to be fraud within the meaning of the statute, or it may be difficult to say that any particular case was rightly decided, but yet the distinction is a real one.

Upon questions of notice, it might be well to consider the language of, and the cases decided under the Merchant Shipping Act, 1894, some of the sections of which are very similar to those contained in the Torrens System Statutes.

Section 69 of the Act says: "If there is more than one mortgage registered on the same ship, or share therein, the mortgagees shall *notwithstanding any express, implied or constructive notice,* be entitled in priority, one over the other, according to the dates at which each instrument is recorded in the register books, and not according to the date of each instrument itself."

Williams, J., with reference to the arguments of counsel that an intending mortgagee of a ship belonging to a company, having had notice of the issue of debentures by the company, should be postponed to the charge created by the debentures, says: "It seems to me that 69th section is a liv-

ing section and I must give effect to it," and further says, " I hold, therefore, that the title of these people, they having got a mortgage in the statutory form, which has been registered, is to be preferred to the title of those people who, having a prior equitable title chose not to get, as they were entitled to get if they chose, their prior equitable title converted into a legal title in the statutory form and registered." (*Black* v. *Williams* [1895], 1 Ch. 408; 65 L. J. Ch. 137).

In *Barclay & Co. Ltd.* v. *Poole,* 76 L. J. Ch. 488, an owner of shares in a ship mortgaged his shares to mortgagees, who did not register the mortgage. He then misappropriated part of the ship's money, and agreed to sell his shares to two other owners of shares in the ship, and to apply the purchase money in discharging his debt to the ship; the balance to be paid to himself. The bill of sale was duly registered, and the mortgagees on learning of its registration, claimed to have a prior right to the purchase money, but it was held that notwithstanding this notice, the purchasers were entitled to apply the purchase money in paying the vendor's debts to the ship, and that the mortgagees could only claim the balance.

" It is obvious to every one that the Torrens Act is the mere adaptation of the Shipping Acts to land, and if it be allowed to substitute the word " land " for " ship " in the judgments of the Lords Justices in *Hughes* v. *Morris,* 2 DeG. M. & G. 349, that case undoubtedly governs the present. (Per Gwynne, J., in *Lange* v. *Ruwoldt,* 7 S. A. L. R. 15).

"The great policy of the Shipping Acts, to which everything had to be subservient and which required a particular mode of transfer and registration in order to afford the means of discovering the true owners of British ships, in order that none but British subjects should have interest in them, and which compelled the Courts, even in the absence of prohibitive words, to declare there could be no transfer of equitable as distinguished from legal interest in British ships, or in a form not recognized by the Acts, has no counterpart in the Real Property Acts, except as to the protection of purchasers from adverse claims, which can be sufficiently effected without prohibiting the existence of trusts enforceable, except as against purchasers, and transferable like any other description of equitable estates or interests in real property not under the provisions of the Act. There is nothing in the policy of the Real Property Act which renders it necessary that trusts should not exist or that contracts for the sale of land should not be enforced, so long as a person acquiring a title by transfer as a purchaser is protected from adverse claims, estates or interests, and this, we are of opinion, appears clearly from the language of the Act in the preamble, and those clauses which are enacted with a view to effect the intention of the legislature" (*Cuthbertson* v. *Swan,* 11 S. A. R. 102, at 111. See, however, *Robison* v. *Coal Cliff Co.,* 12 N. S. Eq. 315, and in support see *In re Wildash,* 1 Q. L. R. Part 2, 47 at 49).

Cyprian Williams at p. 1189 of his work on the Law of Vendor and Purchaser, in considering the

question as to whether the purchaser of land registered under the English Act, who before completion receives notice of some unregistered estate, interest, or equity, adverse to the vendor's registered estate, is bound to have regard thereto, submits that he is not so bound, that priority of interest is to be determined by priority of registration alone, and that so long as the persons claiming unregistered interests do not protect themselves by a registered caution, etc., anyone dealing with registered land in such a way that he is about to become registered as the proprietor or a chargee thereof is entitled if he can, to gain priority of interest, by procuring priority of registration, notwithstanding that he have notice actual, or constructive, of any unregistered interest whatever.

He regards persons who are entitled to unregistered interests, but who fail to protect them by an appropriate entry on the register, as being estopped from asserting their claim against persons taking under an exercise of their statutory powers.

He suggests that to refrain, when informed of a proposed dealing with the land, from protecting a bare right or equity, such as the right to set aside a prior conveyance induced by fraud, by a caveat or other method of registration, is evidence of an intention to affirm the voidable conveyance, but when he comes to a rule of practice, he lays down the rule that an intending purchaser or mortgagee of registered land cannot safely assume more than this, viz., that where by the equitable rule of

notice, it would be merely a technical fraud in equity to act in disregard of notice acquired of some unregistered estate or interest, he is at liberty, if he can, to acquire priority of interest by priority of registration.

By technical fraud in equity, he means the kind of fraud which Courts of equity held to be committed when a purchaser or mortgagee of land in a register county, registered his conveyance in priority to some previous assurance of which he had notice (see *LeNeve* v. *LeNeve,* Amb. 436, and *Wyatt* v. *Barwell,* 19 V. 435).

At p. 1192 Williams considers the question as to whether a vendor can enforce a contract for sale or a mortgage against a purchaser who has notice of an unregistered estate, interest, or equity.

He suggests that the Court will not interfere to assist the vendor to get rid, by registration of a transfer or charge from himself, of any lawful estates or interests which would otherwise remain perfectly valid, but that, even if the Court did so interfere, the purchaser would be entitled to enforce the contract in every case where the unregistered estate, interest, or equity would be extinguished or defeated by the registration of transfer from the registered proprietor to himself.

If this suggestion be correct, he says, a purchaser of registered land, who had received notice of unregistered estates or interests adverse to the vendor's title, would have two courses open to him —he might object to the title, and refuse to complete, except with the concurrence of all persons entitled to the unregistered interest, or if the

unregistered interests were such as would be extinguished by the transfer to himself, and remained unprotected on the register, he might proceed with his purchase.

In *Cooper* v. *Anderson,* 20 W. L. R. 347, and 1 W. W. R. 848, it was held that where land is registered under the Real Property Act, Manitoba, and a purchaser, relying on a certificate of title, enters into an agreement to buy from the registered owner, pays part of the purchase price and registers a caveat without notice of any fraud affecting the title (the fraud in this case being the fraudulent use of a power of attorney, to effect the sale to the vendor), the certificate of title is conclusive so far as the purchaser is concerned and cannot be set aside or altered to his prejudice. Subsequent notice of fraud does not affect the purchaser, even if received before completion of the purchase by payment in full or transfer of the land.

In other words, it is decided that the protection against notice given in section 91 of the Land Titles Act, Manitoba, operates to protect a contract from its inception, if that were innocent, to its termination by completion or otherwise.

If this is the correct interpretation of *Cooper* v. *Anderson,* it would seem that the existence of a prior contract of sale operates to protect a purchaser who registers with notice of fraud, while a purchaser, without a prior contract, under circumstances otherwise identical, would not be protected; so also the commission of the fraud subsequent to the contract would

apparently not vitiate the registration of such a purchaser (see, however, *George* v. *A. M. P. Society,* 4 N. Z. S. C. 165; *Cowell* v. *Stacey,* 13 V. L. R. 84, and *Ross* v. *Victorian Permanent Building Society,* 8 V. L. R. 265, and in favour of the protection of the purchaser from the formation of the contract see *Public Trustee* v. *Arthur,* 25 S. A. R. 59, and *McDonald* v. *Rowe,* 3 A. J. R. (N.) 90).

A registered proprietor or a mortgagee is not protected by the provisions of the Land Transfer Act, 1885, if the circumstances under which he acquires title raise in his mind a strong suspicion that the transaction in which he is engaged is fraud on the rights of another. In such a case he is bound to go no further in it without full enquiry, and to omit such enquiry is a want of honest dealing (*Sheerin* v. *Sheerin and Guy,* 5 Gaz. L. R. (N.Z) 421).

See also the case of *Purmal Brick Co.* v. *Gen. Electric Co.,* 7 W. W. R. 143, where Simmons, J., seems to have thought that a registered mortgage might be notice to the world.

As to notice between completion of a transaction and registration, see *Hine* v. *Dodd,* 2 Atk. 275; *Elsey* v. *Lutyens,* 8 H. 159, and *Reilly* v. *Garnett,* I. R. 7 Eq. 1.

The question of notice is of such importance as affecting priorities, that the judgments in *Monolithic Building Co.,* [1915] 1 Ch. 659, 84 L. J. Ch. 441, are here given as showing the tendency to construe modern Acts strictly as far as doctrines of equity are concerned, as it must be presumed

that the legislature legislated with such doctrines in view.

In that case Cozens-Hardy, M. R. says at p. 661: "This is an appeal from a decision from Astbury, J., and it raises a point which has never been authoritatively decided before. It is undoubtedly of importance, but counsel have not brought to light any authority which expressly decides the question before us. It turns really upon the true meaning of section 93 of the Companies (Consolidation) Act, 1908. The facts which raise the point may be very shortly stated. The defendant company is a limited company subject to the provisions of that Act. It acquired some property in Hertfordshire, and executed a mortgage on March 3rd, 1913, in the ordinary form, for an advance of £500. That was a mortgage to the plaintiff. That mortgage was not registered; it was registered afterwards, but not registered within the period required by the section. The omission to register was not due to any fraud; it was a common mistake of the advisers who thought that a mortgage on land did not require to be registered with the Registrar. There was a first mortgage debenture subsequent to that, which was registered (that was granted to the plaintiff), and there was a second mortgage debenture, which was also registered. The fact that Jenkins, the defendant, had notice of everything that had taken place is quite clear. I never came across a case in which notice was so clearly proved. He was the managing director of the company, he had witnessed the execution of the deed, and I

think was the person who affixed the company's seal, so that Jenkins had the clearest possible notice of the plaintiff's mortgage. I should add—and this is all I need say about it—that subsequently, on March 27th, 1914, three days before the writ in this action was issued, an order of the Court was made extending the time for registering the plaintiff's mortgage until April 17th, 1914, and that order was made without prejudice to the rights of the parties prior to the time when the mortgage was actually registered.

"I propose to consider the language of section 93 without having my mind influenced for the moment—I had almost said without having my mind poisoned for the moment—by consideration of any authorities or other Acts dealing with this question. This was a mortgage on land executed by a company, and s. 93 says (The Master of the Rolls read the section and continued): Mr. Jenkins, of course, was the creditor of the company in respect of his registered debenture. That is quite plain. This section says that so far as any security under the property comprised in the unregistered mortgage is concerned it is to be void against the liquidator and any creditor of the company unless registered within this period. What does that mean? I confess my inability to see that it means anything else than exactly what it says, namely, that it is void against any creditor who has a registered charge on the company's property. I cannot myself see any reason to doubt that, as a matter of construction of this section. It is void also against the liquidator in the event of winding up,

but that is a contingency which we need not consider here, and which might give rise to certain questions which have been stated and discussed in argument, but as to which I deliberately refrain from expressing an opinion. I only propose to deal with this case in reference to the difference of position between a registered secured creditor and a prior unregistered secured creditor. It is said that we ought to read section 93 contrary, as it seems to me, to its construction and intent, as saying an unregistered mortgage shall be void against any creditor of the company, except where he has had notice of its existence. I ask why? Notice is not material in the case of a creditor. I feel the greatest possible difficulty in saying that that doctrine can apply. I put aside altogether any question of fraud. The doctrine of the Court in a case of fraud, of course, proceeds upon a different footing, and any security may be postponed if you can find fraud in its inception. But it is not fraud to take advantage of legal rights, the existence of which may be taken to be known to both parties. We are dealing with a case where there is a common mistake. Then we are asked to go back 170 years, to *Le Neve* v. *Le Neve,* 3 Atk. 646, and to consider the decisions under the Middlesex Registry Act, and certain other Acts under which it was held that there might be such an equity as would induce the Court to say that an unregistered charge should not be postponed to a registered charge.

"In the first place, the language of the Middlesex Registry Act seems to me to be materially different. The preamble to the Act (7 Anne, c.

20), which is found in section 1, is framed in this way: 'Whereas by the different and secret ways of conveying lands, tenements, and hereditaments, such as are ill-disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons (who through many years industry in their trades and employments, and by great frugality, have been enabled to purchase lands, or to lend moneys on land security) have been undone in their purchases and mortgages by prior and secret conveyances and fraudulent incumbrances, and not only themselves but their whole families thereby utterly ruined,' and it then provided that deeds not registered should be adjudged fraudulent or void against any subsequent purchaser for valuable consideration.

"In the great case of *Le Neve* v. *Le Neve,* 3 Atk. 646, where there was a solicitor who had really been concocting a scheme by which the children of a first marriage should be defrauded and deprived of their security by means of a second marriage settlement on the second marriage, Lord Hardwicke held that notice to the solicitor was notice to the second wife, and that in some respects she was affected by his fraudulent conduct. But I do not think it would be correct to say that Lord Hardwicke's decision went simply upon the actual fraud in the concoction and carrying through of the arrangement. That decision, and the decisions which have followed it, have, certainly for the last half-century—it may be for longer—been strongly dissented from by the Courts, and have been followed with great reluctance by Judge after Judge.

But those Judges felt themselves not at liberty—in dealing with the Registry Act on which this decision had been given, and on the interpretation of which many decisions had doubtless depended—to override Lord Hardwicke's decision, and they have in many cases followed it.

"I fail to see the reason why we should apply that principle to a section of a modern Act of Parliament, namely, section 93, which I have read.

"Then it is said that the Court of Appeal in the case of *Greaves* v. *Tofield,* 14 C. D. 563, in the year 1880, really adopted the same principle. It is necessary to consider that case. It arose on the construction of section 12 of the Judgments Act, 1885, which says: 'And whereas by reason of the repeal in the last session of Parliament of the Act of the fifty-third year of King George the Third, chapter one hundred and forty-one, requiring the enrolment of life annuities or rent-charges, purchasers are no longer enabled to ascertain by search what life annuities or rent-charges may have been granted by their vendors or others: Be it, therefore, enacted by the authority aforesaid as follows: Any annuity or rent-charge granted after the passing of this Act, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose

estate is intended to be affected thereby '—and other particulars 'shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars aforesaid in a book.' The words there are 'estates intended to be affected thereby,' and it was held in the Court of Appeal by James L.J., Mellish, L.J., and Baggallay, L.J., that that did not apply where there was notice of an unregistered deed. But I personally do not feel much difficulty about that case for this reason: if you look at it that section was the last section of an Act, in several sections of which it was expressly said certain consequences shall follow notwithstanding any notice. Section 4 says 'that no judgment . . . shall affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said Act in that behalf mentioned shall have been left with the proper officer of the proper Court, any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in anywise notwithstanding.' If you go to section 5, which deals with protections against judgments not registered, it is again provided, 'so that notice of any judgment, decree, order, or rule, not duly registered, shall not avail against purchasers, mortgagees, or creditors.' Section 10 says that 'no order of the Court of Bankruptcy shall affect lands unless it is registered,' any notice of any such order to any such purchaser, mortgagee, or creditor in anywise notwithstanding.' Then you come to section 12, in which there

is a remarkable omission of any reference to the absence of notice. In those circumstances the Court held, differing from Sir George Jessel in the Court below, that there was no contradiction in that case under s. 12, and that the fair meaning of that section was that the old equitable doctrine which had been applied in these matters for many years was deliberately not intended to extend to a section excluding those words which were correctly inserted in sections 3, 4 and 5. (*Sic* in Law Reports. The Law Journal Report runs, more correctly it is thought 'not intended to be excluded,' seeing that words to the contrary were not inserted, as they had been in sections 4, 5 and 10 W. S. S.). Whether that was or was not sufficient to justify the decision I cannot say, but it certainly was a point in the case which distinguishes it from the present case. But is that the only case we ought to consider? I think not. There is another decision of this Court, *Edwards* v. *Edwards,* 2 C. D. 291, under the Bills of Sale Act, a modern Act, where it was argued that an unregistered bill of sale ought to be held good as against a judgment creditor who had notice of its existence, and *Le Neve* v. *Le Neve* was cited. James, L.J., before referring to the language of the Bills of Sale Act, said: 'I think it would be dangerous to engraft an equitable exception upon a modern Act of Parliament. This Act provides that a bill of sale shall be registered within twenty-one days, 'otherwise such bill of sale shall as against all sheriff's officers and other persons seizing any property or effects comprised in such bill of sale, in the execu-

tion of any process of any Court of Law or Equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale.' " Then a little lower down he says: ' The mortgagee says to the execution creditor, ' you are not prejudiced, for you knew of my security.' The execution creditor replies, ' I knew that you had a security, but you knew the law as well as I. You knew that if I issued execution your security would be of no avail as to chattels of which you had not taken possession. I knew that my remedy against those chattels was liable to be defeated by your taking possession before I seized them in execution. You knew that your security was liable to be defeated by my taking them in execution before you took possession.' Both parties stood on their legal rights—neither of them was misleading the other. It is not consistent with the policy of the Legislature to import fine equitable distinctions into these cases, and I am therefore of opinion that the argument founded on the knowledge of the judgment creditor cannot prevail.' Mellish, L.J.'s, judgment is, if possible, still more in point. He says: ' Then it is urged that although this instrument, which was a bill of sale within the Act, was not registered, it is good against the creditor, because he had notice of it when his debt was contracted. Notice he clearly had, but does that

take the case out of the Act? I am of opinion that at law it clearly would not be held to do so.' Then lower down he says: 'Then, is a Court of Equity to act differently? I agree with the Lord Justice James that we ought not to put such constructions on modern Acts of Parliament. If the Legislature says that a deed shall be 'null and void to all intents and purposes whatsoever,' how can a Court of Equity say that in certain circumstances it shall be valid? The Courts of Equity have given relief on equitable grounds from provisions in old Acts of Parliament; '—obviously referring to the Registry Acts—'but this has not been done in the case of modern Acts, which are framed with a view to equitable as well as legal doctrines.'

"Now, can any distinction be drawn because that Act says that the deed shall be 'null and void to all intents and purposes whatsoever?' If a deed is said to be void against the first and second incumbrancers, what is added by saying that it shall be void to all intents and purposes? Of course the deed is not void to all intents and purposes. It is a perfectly good deed against the company so long as it is a going concern. It is not void to all intents and purposes, but it is void as between the two incumbrancers. It is rather strange, but *Edwards* v. *Edwards* was not cited in *Greaves* v. *Tofield.* I have difficulty in distinguishing the principle which guided the Court in those two cases unless the distinction is based upon those two sections to which I have referred. As between those two decisions I certainly prefer *Edwards* v. *Edwards,* and I think the principle of the old equi-

table doctrine laid down in *Le Neve* v. *Le Neve,* and subsequent cases which have followed it, ought not to be applied or extended to modern Acts of Parliament.

"For those reasons I think the decision of the learned Judge below was wrong, and that this appeal ought to be allowed."

Phillimore, L. J., was of the same opinion—and continued:

"No case of fraud was made against the defendant Jenkins, and we need not consider, and cannot consider, whether or not the plaintiff has any remedy against him for negligence or misconduct in his independent office of director of this company. We have to construe section 93 of the statute. It makes void a security; not the debt, not the cause of action, but the security, and not as against everybody, not as against the company grantor, but against the liquidator, and against any creditor, and it leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the company. There are three ways in which documents, or three degrees to which instruments, may be void. They may be void altogether, like a bill of sale under £30 under the Bills of Sale Act, 1882; they may be void as to the security and good as to the obligation; and they may be void against certain parties only; but in each of those cases they are quoad a particular transaction void, and the matter is not made stronger by saying 'to all intents and purposes' or any phrase of that kind.

"Now it is suggested here that the defendant's knowledge of the plaintiff's mortgage precludes him from insisting upon his rights as a registered holder of debentures. I answer in the terms of *Edwards* v. *Edwards,* which has already been quoted by the Master of the Rolls, but which I must just briefly read because I am not going to put any other answer in my own language. 'The mortgagee says to the execution creditor, 'You are not prejudiced, for you knew of my security.' The execution creditor replies, 'I knew that you had a security, but you knew the law as well as I.'' I omit the next words, because they have been already cited. 'Both parties stood on their legal rights—neither of them was misleading the other.' That is this case as the facts have been found. The difficulty in our way is the case of *Greaves* v. *Tofield.* As to *Greaves* v. *Tofield,* three explanations may be given for it, any one of which will let it stand with the principle laid down in *Edwards* v. *Edwards. Greaves* v. *Tofield* was decided on the ground that there was the same phrase in that Act as in the Act of William and Mary. 'Shall not affect any lands or tenements' is the Act of 18 & 19 Victoria. 'No judgment not docketed shall affect any land or tenements,' says the Act of William and Mary, upon which the decision in *Davis* v. *Earl of Strathmore,* 16 Ves. 419, was given, the case which has been followed ever since. This is the first observation to make. Secondly, the mischief in each Act is recited in the same way, as also in the Act of Anne. It is the mischief that the second incumbrancer or purchaser will be deceived

by absence of knowledge of the first, a mischief which cannot ensue if he knows. I omit the subtleties of constructive notice for this purpose. It cannot arise if he in fact knows. The third point is that which the Master of the Rolls has already referred to, that when in that Act it was intended that knowledge or notice should prevent a subsequent purchaser or incumbrancer from relying on non-registration, it was so stated in three other sections, but no such statement was made in the section under consideration in that case. On these grounds it seems to me that *Greaves* v. *Tofield* may well stand as a decision—and we cannot overrule it—upon the particular Act of Parliament without being in any way in conflict with the broader language of *Edwards* v. *Edwards.*

"Now, what principles do the respondents in this case contend for? There are only two ways in which this matter can be put. The first is, that the object of registration is to prevent people advancing money or purchasing in the dark. It is in order that people who do not know shall not be affected by a prior assurance. If they do know the mischief disappears, and therefore although there is no such phrase in the Act it does not apply to such cases. The other is on a different principle. The other makes the subsequent incumbrancer trustee for the first incumbrancer, and that is the view in *Le Neve* v. *Le Neve,* which Lord Hardwicke puts upon *dolus malus,* and what he calls (quoting from the civil law) '*machinationem ad circumveniendum.*' In the particular case there was that very thing. If B. knows of an incumbrance on Black

Acre already effected in favour of A., he may take a second incumbrance without intending to destroy A.'s incumbrance, when he takes it thinking that there will be sufficient for both and when he finds that there will not be sufficient for both he may effect registration of his incumbrance knowing that the other has not been registered, with a view to getting as much advantage as he can. There is no fraud in that. He is standing on his legal rights. But if A. has a conveyance of the whole property, and B. takes a second conveyance of the whole property, knowing that A.'s is not registered, and promptly registers, then his endeavour from the beginning has been to destroy that which he knows was an honest transaction though not protected by law. It is the same of course if, knowing that A. has a conveyance of the whole property, he takes a mortgage which partially affects A., or if, A. having a mortgage, B. takes a conveyance which will defeat A.'s mortgage, and that is what happened in *Le Neve* v. *Le Neve*. It was not that the registration was effected in order to gain an advantage. It was that the whole inception of the transaction was to create an assurance which would defeat what the party intending to defeat it knew was an honest transaction. In such a case, I assume that the manner in which the matter would be worked out would be by making the second person trustee of his advantages in favour of the first where there are third persons to be considered; but if there are none, all that need be said is that the second person is postponed to the first because he must be taken to have known of the first all along. The way

of working out an administration of the assets if there was a liquidation, and if there were other creditors coming in, would be, it seems to me, difficult in both those cases, and extremely difficult in the case where, as in this case, there was no fraud at all.

" On all these grounds it seems to me that the best thing is to go to the plain words of the statute. This document as against any creditor is void. The defendant here is a creditor, and therefore as against him it is as if it did not exist. Let us not import considerations which may be applicable, where there is *dolus malus,* but which in any other case neither are applicable, nor should be made applicable.

" Therefore I agree that this appeal should be allowed."

Joyce, J., said—" This appeal, it appears to me, raises an important general question, and that is whether a creditor, in this case a secured creditor, who at the time of his debt being contracted, or of his taking his security, had notice of a prior unregistered security on the company's property, is thereby precluded from setting up section 93 of the Companies (Consolidated) Act, 1908, against such prior security.

" Now, in my opinion it would be most unfortunate, and lead to endless difficulty and confusion, if the decision of the Court below in this case were to stand. We have to consider the plain, or certainly tolerably plain, words of that recent Act of Parliament. There is a saying of Parke, B., 10 M. & W. at p. 521, with reference to the con-

struction of Acts of Parliament, which I should like to cite: 'It is our duty to construe the statute according to the grammatical meaning of the words, unless some absurdity would ensue from so construing it, or a uniform series of decisions had already established a different construction. I do not think any of the cases cited of sufficient weight to preclude us from putting our own construction on the words of the statute.' There are also some observations of Sir George Jessel, very similar to what we constantly hear about the construction of wills, in *Ex parte Blaiberg,* 23 Ch. D. 254, 257, which was a bill of sale case. He says: 'Whatever view we take of this case the result will be a singular one, and one which was probably not contemplated by the Legislature. I think the proper course is to read the section of the Act and to ascertain its meaning, and not to trouble ourselves about decisions upon the former Act. Any other course would be apt to lead us astray. If the later Act can have only one meaning we ought to give effect to it accordingly. If instead of doing that we compare it with the former Act, and say that it differs from it only to such and such an extent, and then consider the decisions on the former Act, we might in that way go back to half a dozen older Acts, and after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later Act.'

"Now, this is a modern Act. I will not read again what the Master of the Rolls has read from Mellish, L.J.'s, judgment, which has never been questioned or criticized in any respect, but those

observations in his judgment are, to my mind, very much in point in this case. I think that before getting lost in any wilderness of authorities, or a multitude of exceptions, we ought to look at the Act itself, and I think the Act is perfectly plain. The Act itself does not say that any charge shall be void altogether, but it specifies in the most precise and complete manner—it takes several lines to do it—it prescribes in the most precise and particular manner the extent to which the other charges are to be avoided. Upon that specification the respondents seek to set up a qualification, or rather to insert an exception among the creditors. They want to insert the following exception from the creditors there mentioned: 'with the exception of creditors who have notice of the prior charge.' Having regard to that contention, it is important to remember that the statute avoids the charge as against the liquidator. Now, he of all persons is the person who has notice. The company, and he represents the company, has notice of the charge. If the unregistered charge is to be void as against him, I, myself, have great difficulty in seeing what would be the sense of making it not void as against some other creditors, and I should also have great difficulty in seeing how the matter would work out if we assented to the construction sought to be placed on this section by the respondent. I have great difficulty in seeing how it would work out in a winding-up. Practically, in my opinion, it would be unworkable, and, for my own part, I could not sanction the engrafting on these plain words of the Act a very ingenious limitation, which

in the result would render this section unworkable and absurd. I think the section means exactly what it says, and that it is not subject to any such exception as has been suggested by the respondent in this appeal."

Questions relating to forgery raise questions somewhat different from fraud.

In *Bailey* v. *Cribb & McDonald,* 2 Q. L. R. 42, Bailey's land was transferred to Cribb by a forged transfer, and the latter became registered. The title was subsequently transferred to McDonald, who also became registered. The title of McDonald to the land was held to be unimpeachable.

In *Gibbs* v. *Messer,* 60 L. J. P. C. 20; [1891], A. C. 248, a certain Mrs. Messer resident in Scotland was the registered proprietor of land in Victoria. Her husband in Victoria had a power of attorney to sell or mortgage the land. On his return to Scotland he deposited this power of attorney and his wife's duplicate certificate of title with a certain Cresswell. Cresswell forged a transfer of the land by Mr. Messer, as his wife's attorney to a fictitious person, "Hugh Cameron, of North Hamilton, County of Dundas, grazier." It was admitted that no such person was in existence. Cresswell then gave a mortgage signed by "Hugh Cameron," he himself being the attesting witness, to a certain McIntyre.

In the Victorian Supreme Court it was held that Cresswell had assumed the name of Hugh Cameron and that in favour of the mortgagee, McIntyre, he was to be regarded as the proprietor of the land with whom McIntyre had dealt on the

faith of the certificate evidencing his title. This view did not commend itself to the Privy Council upon appeal. The Board held that a man cannot with any propriety, be said to assume a name, or in other words, an alias, unless he acts personally under that name or asserts it to be his own designation. "In first registering a fictitious Hugh Cameron as proprietor of the land, and then executing and delivering a mortgage in the name of Hugh Cameron, Cresswell represented the mortgagor to be a person other than himself, and committed the crime of forgery." The mortgage was held to be a nullity and McIntyre was held not to be within the protection of the statute, owing to having dealt not with a registered proprietor but with an agent and a forger, whose name was not on the register, in reliance upon his honesty.

Their Lordships approved of the principle that a forged transfer or mortgage will, when duly entered on the register, become the root of a valid title in a *bona fide* purchaser, but pointed out that there was no enactment which made indefeasible the registered right of a transferee or mortgagee under a null deed.

In *Assets Co.* v. *Mere Roihi,* 74 L. J. P. C. 49, it was held that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner, or from a person claiming under a title, certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not

affect him, unless knowledge of it is brought home to him or his agents.

The case was distinguished from *Gibbs* v. *Messer, supra,* by the fact that in the latter case two *bona fide* purchasers were on the register and the case turned on the non-existence of any real person to accept a transfer and get registered himself and then to make a transfer to someone else. "Moreover," says Lord Lindley, "forgery is more than fraud, and gives rise to considerations peculiar to itself." And again in his judgment he says, "It is said that *Gibbs* v. *Messer,* 60 L. J. P. C. 20, 1891 A. C. 248, shows that registered titles may not be conclusive even in favour of a *bona fide* registered purchaser from a registered owner. The cases, no doubt, do show that such a case may occur. The case was one of fraud and forgery. A transfer from a registered owner to a non-existent person had been fraudulently procured and registered and a fictitious transfer from that fictitious transferee to a *bona fide* mortgagee was afterwards registered. In a suit by the first registered owner against the Registrar, the registered mortgagee and the perpetrator of the fraud, the name of the first registered owner was ordered to be restored to the register by this Board. The Supreme Court of Victoria had held that the true owner had lost her property, but was entitled to damages under the Compensation Fund. The appeal was by the Registrar from this decision. This Board held that as there was in fact neither any transferee from the first registered owner nor any transferor to the registered mortgagee, there was

nothing to deprive the first registered owner of her property, nothing in fact on which the subsequent registrations could operate, and those registrations were accordingly ordered to be cancelled. Lord Watson, in his observations on the protections given to *bona fide* purchasers, points out that a *bona fide* purchaser from a registered owner is in a better position than a first registered owner whose title may be impeached for fraud, but there is nothing in his judgment in favour of the view that an original registered owner claiming through a real person, does not get a good title against everyone, except in the cases specially mentioned in the Act, fraud being one of them."

As to a mortgage taken from an innocent transferee under a forgery, see *Brown* v. *Broughton,* 8 W. W. R. 889.

CHAPTER XXXVI.

Caveats.

The lodging of a caveat, or the failure to lodge, may affect considerably priorities as between mortgagees or other persons having an interest in the mortgaged lands. The sections relating to the effect of the registration of a caveat are as follows:

Any person claiming to be interested under any will, settlement, or trust deed, or any instrument of transfer, or transmission, or under an unregistered instrument, or under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is registered in the name of some other person; or otherwise howsoever in any land, mortgage, or incumbrance, may cause to be filed on his behalf with the Registrar a caveat in Form W., in the schedule to this Act, against the registration of any person as transferee or owner of, or of any instrument affecting such estate or interest unless such instrument be expressed to be subject to the claim of the caveator. (Alta., s. 84).

So long as any caveat remains in force, the Registrar shall not register an instrument purporting to affect the land, mortgage or incumbrance in respect to which such caveat is lodged, unless such instrument is expressed to be subject to the claim of the caveator. (Alta., s. 87).

Any person claiming an estate or interest in land, mortgage, or incumbrance under the new system may file or cause to be filed on his behalf with

the District Registrar a caveat in the form in Schedule H. to this Act forbidding the registration of any person as transferee or owner of, or of any instrument affecting such estate or interest, or unless such instrument be expressly subject to the claim of the caveator. (Man., s. 138).

So long as any caveat prohibiting the transfer or other dealing with any land, mortgage, or incumbrance remains in force, the District Registrar shall not register any instrument purporting to transfer, mortgage or incumber the land, mortgage or incumbrance in respect to which such caveat is lodged, unless such instrument be expressed to be subject to the claim of the caveator. (Man., s. 140).

The filing of a caveat by the District Registrar, or by any caveator, shall give the same effect as to priority to the instrument or subject matter on which said caveat is based, as the registration of any instrument under this Act; and the district registrar may, in his discretion, allow the withdrawal of such caveat at any time, and the registration, in lieu thereof, of the instrument under which the person on whose behalf such caveat was filed claims his title or interest; and, if the withdrawal of such caveat and the registration of such instrument be simultaneous, the same priority shall be preserved to all rights under the instrument as the same rights were entitled to under the caveat. (Man., s. 151).

Registration by way of a caveat whether by the Registrar or by any caveator shall have the same effect as to priority as the registration of any

instrument under this Act, and the Registrar may in his discretion allow the withdrawal of such caveat at any time and the registration in lieu thereof of the instrument under which the person on whose behalf such caveat is lodged claims his title or interest, provided that such instrument is an instrument that may be registered under this Act, and if the withdrawal of such caveat, and the registration of such instrument is simultaneous, the same priority shall be preserved to all rights under the instrument as the same rights were entitled to under the caveat. (Alta., s. 97).

It should be noticed that Man. section 151 originally ran in language similar to that of Alta. 97, but has since been altered to its present form.

Any person claiming to be interested in any will, settlement or trust deed, or under any instrument of transfer or transmission, or under any unregistered instrument, or under an execution where the execution creditor seeks to affect land, in which the execution debtor is interested beneficially, but the title to which is registered in the name of some other person, or otherwise howsoever whether under an instrument in writing or not, may lodge a caveat with the Registrar to the effect that no registration of any transfer or other instrument affecting the said land shall be made, and that no certificate of title therefor shall be granted until such caveat has been withdrawn, or has lapsed, as hereinafter provided, unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat. (Sask., s. 125).

So long as any caveat remains in force the Registrar shall not enter in the register any memorandum of any transfer or other instrument purporting to transfer, incumber, or otherwise deal with, or affect the land in respect of which such caveat is lodged, except subject to the claim of the caveator. (Sask., s. 128).

These sections, with perhaps the exception of the somewhat extraordinary provisions made by section 97 of the Alberta Act, seem to give the caveat fairly definite characteristics, and before generalizing as to the caveat, it may be well to note some of their minor differences.

It is said that in Manitoba and Alberta, but not in Saskatchewan, caveats claiming an interest in mortgages and incumbrances are permitted. It is difficult to see, however, how the failure to enumerate mortgages and incumbrances as the possible subject matter of interest upon which caveats can be founded, can reasonably be translated in this sense, especially in view of the statutory definition of the word " land " contained in all the statutes. See Thom on Canadian Torrens System, p. 388.

It was said, prior to the recent addition of the words "howsoever whether under an instrument in writing or not," that in Saskatchewan the effect of the words "or otherwise" was not to extend the enumeration of the interests upon which a caveat may be founded, and that consequently a caveat cannot be founded upon any transaction which is not effected or evidenced by a written instrument. (See Thom's Torrens System, 366). The statement is based upon a decision said to have been

given by the Master of Titles in *Re Ostad's Caveat;* the conclusion being drawn that (notwithstanding the language of Wetmore, C.J., in *Re Wark Caveat,* 2 Sask. L. R. 431, viz., " the expression in section 136 (now 125) of the Act of 1906, that any person claiming to be interested in the land may lodge a caveat with the Registrar, is not governed by section 79 (now 68). The word 'claiming' gives this section a wider significance, and I apprehend that it is good, therefore, to enable any person claiming a beneficial interest of any sort to lodge his caveat so as to prevent the land being disposed of," a claim such as under a vendor's lien or an equitable mortgage by deposit of certificate of title without written memorandum, or a claim by the prior registered owner that the present registered owner had obtained the land fraudulently and without consideration are not grounds for filing a caveat in Saskatchewan.

With respect to the provision in the Alberta Act, where the words are " or otherwise howsoever," it has been held, in *Re McCullough* v. *Graham,* 21 W. L. R. 349, that the interest in partnership land belonging to the partnership may be protected by a caveat, although the partnership was not evidenced by writing.

Apart then from that eccentric section, 97, of the Alberta Statute, it will be sufficient for the present purposes, which is merely to state the nature of a caveat sufficiently to serve as an introduction to a determination of its effect with regard to conferring or retaining priority for the charge or other interest on which it may be based, to state somewhat arbitrarily that nature.

The power of caveating conferred by the enactment is a very wide one, and the right to do so is closely analogous to the right of obtaining an injunction from the Courts: *Ex parte Solling,* 14 N. S. W. 399; *Biggs* v. *Waterhouse,* 12 S. A. R. 75; *Clissold* v. *Bellomi,* 10 N. S. W. Eq. 191; *In re Hitchcock,* 17 W. N. N. S. W. 62; *General Finance Company* v. *Perpetual Executors,* 27 V. L. R. 739; *In re Bielfeld,* 12 N. Z. R. 596; *In re Martin,* 1900, S. A. R. 69; *McEacharn* v. *Colton* [1902], A. C. 104. In *Broadfoot* v. *Foxwell,* 7 Q. L. J. 4, where the plaintiff's interest was held sufficient to entitle him to an injunction, and *Staples* v. *Corby,* 19 N. Z. R. 517, where the interest was held not to be sufficient to support a claim for an injunction, caveats were not lodged, but the two rights to an injunction, and to a caveat, seem to have been treated on the same footing, and governed by the same principles.

Neglect to lodge a caveat or keep it alive appears to be treated as evidence of a waiver of the rights which might have been protected by means of a caveat: See *Patchell* v. *Maunsell,* 7 V. L. R. 6; *Ex parte Clark,* 17 V. L. R. 82; *Oertel* v. *Hordern,* 1902, 2 S. R. Eq. (N.S.W.) 37; *Howell* v. *Union Bank,* 6 N. Z. R. 567; Hogg, p. 1039.

The true principle which should govern the question whether an interest be caveatable or not is that a caveat may be entered under circumstances which would justify an injunction being granted by the Courts, and at the same time it must be remembered that given the caveator's interest, a caveat may be entered as a matter of right under

circumstances that might not call for the immediate intervention of the Courts: Hogg, p. 1039.

A caveat, then, will keep the property in *statu quo,* and will afford notice to persons who propose to deal with the registered owner of restrictions upon his rights.

The mere fact of the caveat being entered upon the register is not, however, necessary *notice to all the world* of the restrictions imposed on the proprietor of the land (*In re Wildash, supra; Queensland Trustee* v. *Registrar-General* (1893), 5 Q. L. J. at 51; but see as to effect of registration generally, *Purmal Brick* v. *Gen. Electric Co.,* 7 W. W. R. 143).

A caveat is sometimes spoken of as though it were an instrument which, by priority of registration, secured priority of interest (see *In re Scanlan,* 3 Q. L. J. 43); the observations to this effect in the judgment were not necessary for the decision of the case, since the caveator's equitable title was prior in date independently of his caveat. But the proper view seems to be that a caveat is worthless unless there is in existence, at the time of its entry on the register, an enforceable right of some kind relating to the land, and that on any such right coming to an end the caveat becomes of no effect. (See *Butler* v. *Saddle Hill G. M. Co.,* 2 N. Z. S. C. 296; *Kissling* v. *Mitchelson,* 3 N. Z. C. A. 261; but see Alta., s. 97, and *Royal Bank* v. *Banque D'Hochelaga,* 7 W. W. R. 817, and *Stephens* v. *Gray,* 5 W. W. R. 201).

In *Re Scanlan,* 3 Q. L. J. 43, one Donahue, on June 25th, 1886, bargained and sold a piece of

land to one Heaslop. On June 30th Donahue tried to withdraw from the bargain, and Heaslop's solicitors, by his instructions, entered a caveat against the land. The caveat was lodged in the registry on July 1st, but it was not entered upon the register until the 13th. On June 26th Donahue had sold the same land to Scanlan, and on July 14th Scanlan paid the purchase money and received the memorandum of transfer, with the certificate of title, from Donahue. He did not, however, lodge these in the registry until August 13th. Lilley, C. J., in his judgment dealt with the action as if the caveat had been registered as of July 15th:—

"Neither of them had title completed by actual entry on the register, that is a legal title as distinguished from an equitable one, but, either of them being a purchaser for value, could obtain priority of the other by getting in the legal title, or, in other words, securing priority of registration. As between the two on their equitable titles, Heaslop was first in time, and therefore stronger in right. On the following morning, the 15th of July, Heaslop's position was further strengthened; he had lodged his caveat, which was on that day entered on the register by the Registrar, and had obtained a statutory protection of his prior equitable right. The effect of a caveat was expressly decided by me in the case, *In re Wildash*. In that case I find, at p. 53, I said, 'A caveat prohibits any subsequent dealing under the Act, and with greater force, outside the Act in derogation of the claim it protects, if it is well founded. As between the unregistered

transactions of Scanlan and Heaslop the caveat protected the prior good equitable title of Heaslop against any effort of Scanlan to secure a paramount title by registration. Scanlan's title, if registered, could only take effect from the 13th of August, when he delivered the transfer and certificate to the Registrar; consequently he must fail, as Heaslop's prior title was protected certainly from the 15th July. Heaslop was in fact first on the register on that day.' "

(See judgment in *Barnes* v. *James,* quoted at end of chapter).

In considering the question of the effect of a caveat much stress is commonly laid on the case of *McKillop & Benjafield* v. *Alexander,* 45 S. C. R. 551, but it must be remembered that that case is primarily not a decision so much upon the effect of a caveat, as upon the effect of a covenant containing an agreement guarding against the recognition by the vendor of sub-purchasers.

The facts were that the Canadian Northern Railway Co. sold land to a certain Potter by instalment payments, the purchaser covenanting for himself and his assigns; but no assignment of the contract should be valid, unless the same should be for the entire interest of the purchaser and approved and countersigned on behalf of the company by a duly authorized person. Potter in turn sold land to a certain Gesman, and he sold half of the lands to Alexander, and immediately afterwards sold the whole of the land to McKillop & Benjafield. Immediately after the latter sale Alexander registered the caveat, and about a month after-

wards McKillop & Benjafield paid Gesman the balance of the purchase money, and received an assignment of the original agreement of sale, that assignment being approved by the vendors at a date intermediate between the lodging of Alexander's caveat and the assignment of Gesman. The majority of the Court agreed that Alexander was protected by the lodging of his caveat, prior to the completion of the purchase by McKillop & Benjafield.

But Duff, J., dissented from the decision.

The majority of the Court treated the case as if it were a case of competing equities, and held that the prior equity of Alexander, protected as it was by a caveat prior to the registration of McKillop & Benjafield, was entitled to priority. There is no doubt that Duff, J., would not have dissented from the conclusion if his premises had been the same, but he considered, it seems, that there was only one equity, viz.: that of McKillop & Benjafield, Alexander having no equity owing to the condition in the original agreement restrictive of unapproved assignments. (See further as to the effect of such conditions, *Atlantic Realty Co., Limited, & Bonneau* v. *Jackson,* 5 W. W. R. 535, and *C. N. R.* v. *Peterson,* 6 W. W. R. 1194).

It is true that Anglin, J., delivering a judgment concurred in by Brodeur, J., says that he inclined to the view that a caveat must be deemed notice to every person who claims to have acquired subsequently to its being lodged any interest in the lands, or to have increased or bettered any such interest already held, and that whatever its effect

might be as to notice that a caveat when properly lodged prevented the acquisition or the bettering or increasing of any interest in the land legal or equitable adverse to, or in derogation of the claim of the caveator, at all events as it exists at the time when the caveat is lodged.

The views of Duff, J., seem to be more consonant with principle. He says the fundamental principle of the system of conveyancing established by this and like enactments is that title to land and interests in land is to depend upon registration by a public officer and not upon the effect of transactions between parties. "The Act at the same time recognizes unregistered rights respecting land, confirms the jurisdiction of the Courts with respect to such rights, and furthermore makes provision by the machinery of the caveat for protecting such rights without respect to the Courts. This machinery, however, was designed for the protection of rights, not for the creation of rights. A caveat prevents any disposition of his title by the registered proprietor in derogation of the caveator's claim until that claim has been satisfied or disposed of, but the caveator's claim must stand or fall on its own merits. If the caveator has no right enforceable against the registered owner which entitled him to restrain the alienation of the owner's title, then the caveat itself cannot and does not impose any burden on the registered title. Alexander's caveat consequently conferred no right upon him. It could only operate to protect such rights as he had, or could enforce against the land, that is to say, *against the registered owner of the land.* It is

quite clear, as I have pointed out, that he had no such rights, and the filing of the caveat therefore was wrongful interference with the proprietary rights of the company, for which Alexander might have been answerable in damages, if the company had sustained any loss in consequence of it. It seems equally clear that the caveat could not affect the appellant, as bringing home to them notice of the transaction between Alexander and Gesman. The statute does not say that the caveat shall operate as notice of the facts stated in it to intending purchasers, and there is not anything in the statute giving the least ground or colour for attributing to it any such operation. If an intending purchaser chooses to close his purchase by paying his purchase money without first acquiring a registered title, he runs the risk of finding that he cannot get a registered title until some registered claim has been satisfied, or some unregistered interest acquired, but he incurs this risk, not because he is deemed to have had notice of the claim, and for that reason to be bound in good faith to recognize it, but because he can only acquire a title by registration, and registration he cannot have free from an enforceable claim against the registered title in face of a caveat founded upon such a claim until that claim has been satisfied, or the superiority of his claim has been established."

In view of the language of the sections relating to the effect of a caveat, it is difficult to accept the words of Anglin, J., in all their fulness, and it is suggested that in order to give them a meaning warranted by the Acts, they must be read as if they

asserted that a caveat when properly lodged prevents the acquisition *by registration* or the bettering or increasing of any interest in the land legal or equitable adverse to, or in derogation of the claim of the caveator; at all events as it exists at the time the caveat was lodged by the same means. See *Queensland Trustee* v. *Registrar of Titles,* 5 Q. L. J. 46, where it was held that a caveat does not prevent dealings with the land which may be completed without registration, *e.g.,* the making of further advances under a mortgage which provides therefor, the mortgagee not being bound to search for caveats before making each new advance, and the existence of a caveat not operating as notice to him.

The enigmatical section of Alberta, viz., section 97, *supra,* presents problems of its own. These problems came up for consideration in *Stephens* v. *Bannan & Grey,* 5 W. W. R. 201.

In that case Stephens bought by instalment payments from the Hudson's Bay Co., and assigned the benefit of his agreement to Dodge & Goldsmith. Prior to this assignment Dodge & Goldsmith agreed to sell the land to Lloyd on instalment payments, and five years after the assignment Lloyd agreed to sell to Grey by instalment payments, and Grey filed a caveat.

In the meantime Stephens had died, and his executor paid the full amount due from Stephens to the Hudson's Bay Co., and prior to registration and to Grey's caveat agreed to sell the land to Mrs. Bannon, and Mrs. Bannon filed a caveat about a month subsequent to the filing of the caveat by

Grey, and shortly afterwards paid Stephens' executor the whole purchase money. The executor on obtaining an abstract of title to the land for the purpose of asking a transfer from the H. B. Co. discovered Grey's caveat. The Court decided that Grey was entitled to priority on the general principle of *qui prior est tempore, potior est jure.*

Beck, J., in delivering judgment, said that as between claims of two caveators the section fixed the priorities of the claim according to the dates of the lodging of the caveats, so that the only questions that could be opened between the two caveators were, (1) whether the respective dealings with the land—were it not for the other—created an interest, and that in the same interest in the land, and (2) whether the claim of either of the caveators is avoided by fraud.

In the *Royal Bank of Canada* v. *La Banque d'Hochelaga,* 7 W. W. R. 817, the question as to the effect of 97 came up squarely for decision. In that case a certain Schwalbe mortgaged to a certain Muller; Schwalbe transferred to Gustave Gardel, who became registered owner subject to the mortgage.

On January 13th, 1911, Gustave Gardel deposited the duplicate certificate of title with the Royal Bank by way of equitable mortgage as security for previous advances made to him.

On May 13th, 1911, Gustave Gardel executed a transfer to George Gardel which was not then registered.

On July 17th, 1911, George Gardel, with knowledge of Gustave and at his request, executed a

mortgage to La Banque d'Hochelaga to secure advances theretofore made by the bank to Gustave Gardel.

On July 18th, 1911, the solicitor for La Banque d'Hochelaga tried to register the transfer to George Gardel and the mortgage, but owing to the certificate of title not being in the Land Titles Office, this could not be done and a caveat was filed in respect of the mortgage on July 19th, 1911.

Gustave Gardel on July 27th, 1911, executed a mortgage in the regular form to the Royal Bank to secure its advances.

On August 1st, 1911, this mortgage was registered in the Land Titles Office.

On August 22nd, 1911, the transfer to George Gardel was registered.

On September 9th, 1911, the mortgage to La Banque d'Hochelaga was registered and the Registrar asked to register it as of date of the caveat, but he merely registered it as of September 9th subject to caveat.

The property was sold under the Muller mortgage by an order made in the present action, and after the satisfaction of Muller's claim a balance remained in Court.

The Court held that the caveat filed by La Banque d'Hochelaga was, by virtue of section 97, as effective as if the memorandum of mortgage which the bank held (N.B.—Executed by a transferee who had not at the date of the caveat been registered) had then been registered, but Stuart, J., adhered to his opinion expressed in *Stephens* v.

Bannan, supra, that the words "registration by way of caveat" cannot be interpreted as meaning anything more than registration of a caveat and that s. 97 of the Alberta Act does not give anything more than protection against interests subsequently created.

A caveat is considered to be an instrument within the meaning of section 3 of the interpretation clause of the Queensland Real Property Act, and has been so held by Anglin, J., in *McKillop* v. *Benjafield,* 45 S. C. R. 551, but it has been held not to be an instrument under the Alberta Land Titles Act by Beck, J., in *Stephens* v. *Bannan & Grey,* 5 W. W. R. 201, where that Judge says that a caveat is nothing more than a caution, and an effective notice of a claim of title grounded upon something else, and preventing any change in the rights of the caveator by dealings with the land subsequent to the lodging of the caveat. (Query: Whether the words "by the registered owner" should not be inserted after the word "land," see *supra*).

In *Brooksbank* v. *Burn,* 15 W. L. R. 661, Harvey, J. (now C.J.), held that the effect of this section was that any caveator who registered his claim under an agreement of purchase thereby obtained priority for his claim, over any other purchaser though prior in time, who registers his claim by way of caveat at a subsequent time. "I cannot understand," says he, referring to section 97 of the Alberta Statutes, "what meaning can be given to this provision other than that a caveator who registers his claim under an agreement to purchase thereby obtains priority for his claim over any

other purchaser who registers his claim by way of caveat at a subsequent time, in the same way as a mortgagee who registers his mortgage first acquires priority over one who registers his after."

A city sold lands by instalment payments to a certain Valle. Valle, who, as a matter of fact, was trustee for the North-West Construction Co., assigned his agreement to a certain Wolfe, who gave notice of his assignment to the city. The North-West Construction Co., subsequently to the sale to Wolfe, filed a caveat, and took an action against Valle and Wolfe to have the sale to Wolfe set aside, but the Courts refused to accede to the request of the plaintiff company, considering that it was gross negligence in the plaintiffs not to have filed a caveat earlier or notified the city that Valle was a trustee for them (*North-West Construction Co.* v. *Valle,* 4 W. L. R. 37).

The filing of a caveat does not ordinarily give any validity to the claim of the caveator other than such as it has at the time of the filing of the caveat: (*O'Brien* v. *Pearson,* 20 W. L. R. 510, 1 W. W. R. 1026.)

All the effect that the caveat has is to prevent the Registrar passing a title to a transferee or registering an incumbrance or mortgage by or from a registered owner without putting a memorandum of the caveat upon the certificate of ownership or other document, and the person purchasing or taking the mortgage, or acquiring the incumbrance, is bound to take notice of what the caveator has claimed in this caveat, and takes his right to the property subject to those rights whatever they may be.

The following statement of the judgment of a'Becket, J., in *Barnes* v. *James,* 27 V. L. R. 749, will be found useful:—

" In this action the cause of trouble is the fraud of the defendant James. The plaintiff's case is this: He made an agreement with James under which he advanced money to James to obtain a mining lease, on an agreement between them, which was valid as between them, that on obtaining the lease James should transfer the lease to the plaintiff, but that the plaintiff would only have a half interest. He was to have executed a declaration of trust that he held the other half as trustee for Barnes, and there was some agreement between them that the lease should be sold. As to how it should be sold the evidence is not explicit, but it may be taken as between them that it would not be sold without communication with Barnes. Then the lease was obtained by James, who then, behind the plaintiff's back, sold it to the defendant company, who gave him £300 for it, and worked it, and when the money was paid got a transfer of the lease under the Transfer of Land Act, and got possession of the land.

Under these circumstances the plaintiff makes both James and the company parties to the action, and claims a declaration that he is entitled to the property and possession of it, and he seeks as against James to make him perform his agreement to execute a proper transfer, and against the company possession, accounts, a delivery up of the transfer, and an injunction to restrain it from working the mine. Then under the new rules the

defendant company is asked to state what its defence is. It states that it is a purchaser for value without notice, and has a better right than the plaintiff. I have to consider whether that is a valid defence.

The defendant company has gone into evidence, perhaps unnecessarily, to show that which I think appeared before, viz., that there was no notice to it, that it acted with perfect honesty, was as vigilant as it could be, and had done all that it was able to do to ascertain that James, who appeared to be the proprietor of the lease, was the proprietor, and that there was no caveat against his dealing with the lease, nor any other bar against his selling what he professed to be able to sell. That was distinctly proved. Then, as between persons so situated, what is the Court to do? That is what I have to consider. James does not appear; there is no difficulty as to him. Then, as regards this defence of purchaser for value without notice, so far as I am aware, all the authorities, where real estate is the subject of controversy, are with reference to the general law. They deal with the possession of title deeds, the acquiring of the legal estate, and other matters affecting the general system of real property law. Without saying that a different principle should be applied when dealing with land under the Transfer of Land Act, still I think it should not be left out of sight that we are considering dealings under a special system. Provisions as to showing title, as to what amounts to a sufficient statement of the title, as to the effect of a registered interest, the effect of a caveat, and the general

provisions of the Act are not to be lost sight of, and may, perhaps, to some extent modify and make inapplicable cases of priorities and cases applying to purchasers under the general law. With reference to the Transfer of Land Act, I am not dealing with this case as one in which, by force of that Act, the plaintiff's right is in any way excluded. Accident prevented the defendant company from obtaining registration of the transfer of the lease, and would in the absence of fraud have been a complete answer to the plaintiff's claim. But the defendant company did not reach that position, although it had a transfer executed by the lessee. Therefore, suppose there were a good equity on the part of the plaintiff, a good legal right to undo what had been done, to have an injunction of the Court to restrain the action of the defendant company with reference to this lease, the Court's hand would not be stayed by any provision of the Act. I am not dealing with this case as concluded by the provisions of the Transfer of Land Act. It is open to the plaintiff in such a case, notwithstanding the transfer which has been executed, to say that the transfer shall not be registered. But the plaintiff must come with a better case than that of the defendant.

Then the defendant says that he is entitled to set up the defence that he is a purchaser without any notice, as undoubtedly he is, and in good faith. He then says that consistently with the principles upon which justice was administered by a Court of Equity, and is now administered by this Court, which is a Court of Law and Equity, this Court

should not exercise its powers against the defendant company, it being in the position I have described. Then, on the other hand, it is said that even if a Court of Equity would stay its hand, leaving the plaintiff to the remedy, if any, at law, the fact that this Court, which is a Court of Law and Equity, should in this action decline to interfere would be something more than a mere refusal of equitable assistance, and would amount to an adjudication in favour of the defendant company. My impression was and is that the present defence as a defence of that character of purchaser for value without notice would be a reason for the Court declining to exercise its jurisdiction by ordering delivery up of the transfer or restraining registration of the transfer, or other things by which the defendant company would be in a position to perfect its title. The case has been ably argued for the plaintiff. I cut short the argument for the defendant company, because my mind inclined in its favour. An authority has been cited which I consider quite in point, and an authority which does to some extent support the contention of counsel, viz., that this is a matter as between two equities; that consistently with the principles acted upon in that case, there being something of the nature of a prior estate in the land—not a mere equitable right not reaching the stage of an interest in the land, but an equitable interest—I should regard the plaintiff and the defendant as equitable incumbrancers. Notwithstanding that case, I still think that this defence is a good one. I think there is a better right on the part of the defendant com-

pany, and I think that better right consists in this, that no step was omitted by it by which it could have ascertained the existence of a prior interest in any other person. I cannot say that the plaintiff was negligent, but he might have done more than he did to protect his title by entering a caveat when he ascertained that a lease was issued. There were difficulties in the way, but he could have done more. However, he trusted to James, who imposed upon him. Then the defendant company is in this position—it has paid its money, it has got the lease, it has got a transfer of the lease, and it could have obtained registration immediately but for the absence of its attorney, who was to have signed on its behalf. For that reason it has a better right. I think it would be inequitable to postpone the rights which had been acquired by the defendant company to deprive it of the advantages which it has. It has not the legal estate, but it was on its way to obtain from the proprietor of the legal estate all that was necessary to give it that legal estate. It was in such a position that having acted in perfect good faith and having given value, I think it is more entitled to an affirmance of its title by the Court than the plaintiff is. Therefore, as against the defendant company, this action should be dismissed. I give judgment for the defendant company with costs. Judgment for the plaintiff against James, the damages being half the amount the company gave. I give the plaintiff his costs over against James, who seems to have deceived everyone with whom he came into contact, so far as this case is concerned. I think the Mines

Department should accept this as an adjudication in favour of the defendant company." See also 27 V. L. R. 739, pp. 744-45.

"It has been argued that a caveat is not notice. In one sense, perhaps, it is not notice. It is not on the ground that a caveat is notice that I should consider it proper for any man to search for caveats before he concludes any contract in respect of land which has been brought under the Act, where there is a possibility of there being an outstanding equitable interest. It would, however, be undoubtedly a prudent thing to do. The effect of the caveat is this, that a person claiming any unregistered interest in land which has been brought under the Act can by lodging it prevent either the registered proprietor of such land or of any incumbrance thereon, or any other person claiming any interest in such land, from getting any instrument registered which affects the interest claimed by the caveator until the caveator has had an opportunity of showing that it would be a fraud on his rights to permit such instrument to be put on the register. The man who lodges a caveat as Grant did prevents any man coming after him from attempting to get priority by saying, as was said in this case, that he had got possession of something which he was pleased to call the title deeds, when in fact they were only certificates in the names of former owners. The lodging of a caveat is the means pointed out by the Transfer of Land Act to enable a man who has not been and cannot get registered as the proprietor, or as mortgagee or otherwise, to protect his interest, whatever that interest may be.

It may be that his interest will not prevail, but he has an opportunity of protecting it, and that is the protection which the Act gives him. Let us take the case of a simple trustee, one who has the fee simple in him as trustee, and gets a certificate of title without any incumbrances upon it, as he may be justified in doing. The Act points out the one means by which the person who may have the whole beneficial interest in himself may be protected. What is that? Entering a caveat. The Act does not recognize trusts except in this way; and it was very much doubted at first whether any equitable interests could be recognized at all; but the very section which authorizes the lodging of caveats prescribes the mode of protection, and shows that every person having only an equitable interest ought to lodge a caveat if there is anybody to protect himself against. By doing so he does no harm to anybody, and he does all he can in self-defence in case anybody should afterwards assail his title."

" When for the purpose of giving notice of his interest, an unregistered second mortgagee (by deposit of certificate) lodges a caveat which prevents the entry of transmission to the mortgagor, the caveat must be withdrawn to enable the first mortgagee to perfect his security. (*Re Swain's Caveat,* 1902, S. R. (Q.) 120.)

"This provision expressly recognizes that an unregistered instrument may create a 'claim' cognizable by a Court of Justice, and the caveat is the means devised for the protection of the right of the

claimant pending proceedings in a competent Court to enforce it": Griffith, C. J., in *Barry* v. *Heider,* 19 C. L. R. 197.

An unregistered right to enter and cut timber (an interest in land) unprotected by caveat cannot prevail over a subsequent equitable mortgage protected by caveat: *Connolly* v. *Noone,* 1912, S. R. (Q.) 70.

An execution, a copy of which is filed in the proper office, gives priority over an unregistered equitable mortgage (*Union Bank* v. *Lumsden Milling Co.,* 8 W. W. R. 1167; Supreme Court of Saskatchewan *en banc.* See *Evans* v. *Postill,* 3 Alta. L. R. 141).

The proprietor of an equitable charge on land has priority over a subsequent transferee of the land for value without notice, by reason of the lodgment of a caveat subsequent to the transfer and payment of the purchase moneys, but prior to the registration of the transfer (*Coast Lumber Co.* v. *McLeod,* 7 W. W. R. 113, Supreme Court of Saskatchewan *en banc;* but see dissenting judgment of Newlands, J.)

TRANSFER OF MORTGAGED LAND — IMPLIED COVENANTS.

It is difficult to see how in the case of a foreclosure order under the Acts, the mortgagor can be considered as a 'transferor' in jurisdictions where foreclosure is carried out by a vesting order and not by a direction to the mortgagor or to convey, so as to bring into play the covenants for payment of the mortgage moneys and indemnity implied upon a transfer of mortgaged land. Under the Acts the mortgagee after a foreclosure order is to be deemed a ' transferee,' but there is no direction that the mortgagor is to be deemed a transferor. Consequently the mortgagee as transferee may not be bound by any covenant (implied) to indemnify the mortgagor.

A possible construction of s. 52 of the Alberta Act is that the implied covenant is a covenant with the transferor and the mortgagee jointly. If this be so, the covenant would be void on the mortgagee becoming both transferee and mortgagee, on the general principle that a man cannot covenant with himself, either alone or jointly with another or others; see *Boyce* v. *Edbrooke,* [1903] 1 Ch. 836, and *Faulkner* v. *Lowe,* 2 Ex. 595.

If the covenant were construed to be a joint covenant, it would not be affected by s. 165, which directs the construction of implied covenants as several, and not as joint, inasmuch as transferees do not as a rule execute the transfer. It may be, indeed, that in order to carry out the general scheme of these implied covenants, they may be considered notionally to have executed the transfer.

NOTE AS TO CASES DECIDED SINCE THIS BOOK WAS PRINTED.

Execution after Judgment upon the Covenant in Alberta.

A plaintiff mortgagee in proceedings under section 92 of the Land Titles Act (Alberta), who has obtained judgment on the covenant and an order for sale, will not where the sale has proved abortive, be given leave to issue execution on his judgment. There must be an actual, as distinguished from an abortive sale, before execution can issue without further proceedings (*Ollon* v. *Montgomery,* [1917] 3 W. W. R. 757).

Situs of Mortgage Debt.

A mortgage debt secured by a statutory mortgage duly registered under the Land Titles Act (Alberta), is situate in the Province of Alberta (but *quære* as to whether if the duplicate be under seal it may not also be situate in another province, if the duplicate be found there), and is liable to succession duty in Alberta (*Rex* v. *Toronto General Trusts Corporation,* 1917, 3 W. W. R. 633).

Mortgagee's Accounts.

A mortgagee who sells the mortgaged land under the Act is a trustee of the proceeds of sale for the mortgagor and other encumbrancees, and holding these proceeds as trustee is entitled to retain any moneys which may be due to him under the mortgage, including any moneys which he has

rightfully expended in connection with the mortgaged estate. He may retain money expended in ploughing the mortgaged land to get rid of weeds, if such expenditure in fact increased the selling price (*Waterloo Manufacturing Co. Ltd.* v. *Holland,* 1917, 3 W. W. R. 198).

Opening Foreclosure.

In *Orser* v. *Colonial Investment Co.,* 1917, 3 W. W. R. 513, it was decided that in a foreclosure action where the order *nisi* gives the mortgagee personal judgment, the taking of the final order and vesting of the mortgaged property in the mortgagee does not prevent the mortgagee from proceeding to realize the debt under his personal judgment, so long as he is in a position to reconvey the mortgaged property. If, however, he proceeds on his judgment the foreclosure will be opened.

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